

**APPENDIX**

Supreme Court, U.S.

FILED

NOV 26 1971

CLERK

IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1971

\_\_\_\_\_  
No. 70-295  
\_\_\_\_\_

FIRST NATIONAL CITY BANK,

*Petitioner,*

*v.*

BANCO NACIONAL DE CUBA,

*Respondent.*

\_\_\_\_\_  
**On Writ of Certiorari to the  
United States Court of Appeals  
for the Second Circuit**  
\_\_\_\_\_

Petition for Certiorari filed June 17, 1971

Certiorari granted October 12, 1971

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## INDEX

	PAGE
Docket Entries -----	1
Amended Complaint (Exhibit omitted) -----	11
Answer to Amended Complaint -----	15
Second Amended Reply of Plaintiff -----	29
Opinion and Order of the United States District Court, Southern District of New York -----	34
Opinion of the United States Court of Appeals for the Second Circuit -----	48
Order of the Supreme Court -----	71
Opinion on Remand of the United States Court of Appeals for the Second Circuit -----	72
Order of the Supreme Court -----	88





UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

No. 60 Civ. 4664

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BANCO NACIONAL DE CUBA,

*Plaintiff,*

*v.*

THE FIRST NATIONAL CITY BANK OF NEW YORK,

*Defendant.*

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**Docket Entries**

<i>Date</i>	<i>Proceedings</i>
Nov. 28-60	Filed complaint & issued summons.
Dec. 6-60	Filed summons & return—served deft. 11-30-60.
Dec. 19-60	Filed stip. & order extending time for deft. to answer to 1-9-61. Clerk.
Jan. 9-61	Filed stip. & order extending time for deft. to answer to 1-19-61. Clerk.
Jan. 19-61	Filed deft's Answer to the complaint.
Mar. 6-61	Filed plttf's amended complaint.
Mar. 6-61	Filed deft's answer to amended complaint.
Mar. 28-61	Filed stip. & order extending time for plttf. to answer to 4-10-61. Noonan, J.
Apr. 11-61	Filed plttf's Reply to counterclaim.
Apr. 21-61	Filed plttf's amended reply to counterclaim.
May 24-61	Filed affdvts., exhibits & notice of motion for summary judgment for deft. on first and second causes of action of amended complaint and for setoffs & counterclaims pleaded in its answer to the amended complaint—Ret. 6/6/61.

*Date**Proceedings*

- June 15-61—Memorandum endorsed on notice of motion filed 5/24/61—Motion adjourned from calendar of 6/13/61 to 7/25/61. No interest to be charged from original return date of June 6, 1961 to July 25, 1961. So ordered—Levet, J.
- May 26-61—Filed deft's statement pursuant to Rule 9(g).
- May 26-61—Filed deft's memorandum of law in support of motion for summary judgment.
- July 14-61—Filed affdvt., notice of motion for an order granting leave to plttf. to serve 2nd amended reply—ret. 7/25/61.
- July 14-61—Filed plttf's Memorandum in support.
- July 20-61—Filed plttf's affidavits of Victor Rabinowitz & Dr. Raul Lopez Gonzalez in opposition to motion for summary judgment.
- July 20-61—Filed plttf's memorandum in opposition to motion for summary judgment.
- July 20-61—Filed plttf's statement pursuant to rule 9(g), federal rules of Civil procedure.
- July 26-61—Memo endorsed on notice of motion filed 7/14/61.—Motion granted. So ordered. Bryan, J.—mailed notices.
- Aug. 1-61—Filed plttf's 2nd amended Reply to complaint.
- Aug. 7-61—Filed order assigning case to Bryan, J. for all purposes—Ryan, J. (filed in 60-663).
- Aug. 23-62—Filed Order to Show Cause why an order should not be made granting leave for applicants to intervene, etc. ret. Aug. 28/62, with affdvt. & pleadings.

*Date**Proceedings*

Aug. 28-62—Memo endorsed on order to show cause filed  
8-23-62—This motion is respectfully referred to Judge Bryan—Levet, J.

Oct. 22-62—Filed affdvt. of Victor Rabinowitz.

Nov. 5-62—Memo endorsed on order to show cause filed  
8/23/62—Motion granted without opposition. Applicants for intervention are made parties to the action & proposed pleadings, will be deemed their pleadings as intervenors & deemed served upon other ptys. in this action. This is an order. Bryan, J. m.n.

Apr. 20-64—Pre-trial conference held, Bryan, J.

May 28-64—Filed plttf's affdvt. & notice of motion for summary judgment—Ret. before Bryan, J. at a time to be set by Court.

June 22-64—Filed affdvt. of Henry Harfield.

June 22-64—Filed plttf's supplemental brief in support of motion for summary judgment.

July 24-64—Filed plttf's response to deft's reply of 7-8-64.

July 21-67—Filed deft's reply brief.

July 21-67—Filed deft's reply memorandum.

July 21-67—Filed deft's memorandum.

July 21-67—Filed deft's memorandum.

July 21-67—Filed memorandum Opinion #33857—def't's motion for summary judgment on 2nd claim is granted—judgment will be entered accordingly—plttf's cross-motion for summary judgment on its 1st claim & on the counterclaims is denied—deft's motion for

*Date**Proceedings*

summary judgment on the 1st claim is denied since there are triable issues the case will be tried on the sole issue of amt. which deft. is entitled to assert by way of set-off—So Ordered—Bryan, J. M/N.

July 27-67—Filed affdvt. of Henry Harfield in opposition to plttf's motion to resettle the order of this Court dated July 20, 1967.

July 27-67—Filed judgment & order that deft. 1st Nat'l City have judgment against plttf. Banco Nacional De Cuba dismissing the 2nd claim for relief—Bryan, J. judgment entered—Clerk m/n. Ent. 28-67.

Aug. 14-67—Filed plttf's notice of appeal—mailed copy to Shearman & Sterling.

Oct. 13-67—Filed memo endorsed on unsigned order—plttf's motion for resettlement is in all respects denied. It is so ordered—Bryan, J., mailed notice.

Nov. 1-67—Pre-trial conference held—Before Bryan, J.

Mar. 22-68—Filed stip. & order—If the deft. is lawfully entitled to the offset claimed by it, the amount thereof is such that plttf. will take nothing in this action. This stipulation is made solely for the purpose of permitting entry of a final order & judgment on deft's motion for summary judgment so that plttf. may perfect an appeal from the determinations of law made in the court's opinion dated 7-21-67. Plttf. does not, for any other purpose, make any admissions as to fact or law which may be adverse to it.—So ordered—Bryan, J.

*Date**Proceedings*

Apr. 26-68—Filed Judgment—Ordered, adjudged & decreed that the plttf. take nothing, & that the action be dismissed on the merits & that the deft. First National City Bank have & recover its costs from the plttf., Banco Nacional De Cuba.—Bryan, J. Judgment ent. 4-26-28—Clerk mailed notice. Ent. 4-29-68.

May 20-68—Filed plttf's Notice of Appeal. Mailed copy to: Shearman & Sterling.

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

Nos. 480 and 481—September Term, 1969

Docket Nos. 32533 and 33864

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BANCO NACIONAL DE CUBA,

*Appellant,*

*v.*

THE FIRST NATIONAL CITY BANK OF NEW YORK,

*Appellee.*

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<i>Date</i>	<i>Proceedings</i>
July 12-68—	Filed record (original papers of District Court) (order 7/27/67).
July 12-68—	Dep. Acct. 10241 (4702) CD #7.
July 12-68—	Filed order extending time to file record to 7-12-68 (& in 33864).
July 12-68—	Filed record (original papers of District Court) (& in 33864).
Aug. 15-68—	Filed order extending time to serve appellant's designation of the parts of the record, etc. to 9-13-68.
Aug. 1-69—	Received Docket Fee (Banco Nacional de Cuba) (order 4/26/68) (& in 33864).
Aug. 6-69—	Filed supplemental record (original papers of District Court) (& in 33864).
Dec. 11-69—	Filed order extending time to file appellant's brief to 12-12-69 (& in 33864).
Dec. 12-69—	Filed joint appendix, with proof of service (& in 33864).

*Date**Proceedings*

- Dec. 12-69—Filed brief, appellant with proof of service (& in 33864).
- Jan. 2-70—Filed order extending time to file appellee's brief, to 2-13-70.
- Feb. 10-70—Filed order extending time to file appellees and intervenors brief to 2-27-70 (& in 33864).
- Feb. 27-70—Filed brief, intervenors with proof of service (& in 33864).
- Feb. 27-70—Filed brief, appellee with proof of service (& in 33864).
- Mar. 16-70—Filed order extending time to file appellant's reply brief to 3-16-70 (& in 33864).
- Mar. 16-70—Filed reply brief, appellant with proof of service (& in 33864).
- Mar. 23-70—Argument heard (by: Lumbard, Hays, CJJ & Blumenfeld, DJ) (& in 33864).
- July 16-70—Judgment Reversed and Action Remanded, Lumbard, ChJ. (& in 33864).
- July 16-70—Filed judgment (& in 33864) VACATED 2-25-71.
- July 30-70—Filed motion to stay issuance of mandate (with proof of service) (& in 33864).
- Aug. 4-70—Filed affidavit in opposition to motion to stay issuance of mandate with proof of service (& in 33864).
- Aug. 5-70—Filed reply affidavit in response to opposition papers with proof of service (& in 33864).
- Aug. 19-70—Filed order granting motion for a further stay of the mandate to 10-14-70 (& in 33864).
- Oct. 16-70—Filed notice of filing of petition for writ of certiorari (& in 33864).



SUPREME COURT OF THE UNITED STATES  
No. 846—October Term, 1970

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FIRST NATIONAL CITY BANK,

*Petitioner*

*v.*

BANCO NACIONAL DE CUBA,

*Respondent*

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*Date*

*Proceedings*

Oct. 13-70—Petition for writ of certiorari filed.

Nov. 10-70—Order extending time to file response until  
11-16-70.

Nov. 16-70—Brief in opposition filed.

Nov. 17-70—Reply brief of petitioner filed.

Nov. 20-70—Memorandum filed. (Gov'n.)

Dec. 19-70—Answer of Banco Nacional De Cuba to memo-  
randum submitted by Solicitor General.

Jan. 4-71—Petition distributed.

Jan. 25-71—Petition granted. Adjudged to be vacated and  
remanded. See ORDER.

Feb. 23-71—Judgment issued.

Apr. 15-71—Motion of respondent for waiver of clerk's  
costs filed.

Apr. 16-71—Motion above distributed.

May 3-71—Motion of respondent for waiver of clerk's  
costs is denied. See ORDER.

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

Nos. 798, 799—September Term, 1970

Docket Nos. 32533 and 33864

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BANCO NACIONAL DE CUBA,

*Appellant,*

*v.*

THE FIRST NATIONAL CITY BANK OF NEW YORK,

*Appellee.*

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*Date*

*Proceedings*

- Feb. 1-71—Filed notice from Supreme Court granting petition for writ of certiorari; vacating judgment of this Court and remanding action to Court of Appeals for reconsideration, etc. (& in 33864).
- Feb. 25-71—Filed certified copy of order of Supreme Court granting petition for writ of certiorari (& in 33864).
- Feb. 25-71—Filed certified copy of judgment of Supreme Court vacating judgment of this Court with costs and remanding action to the U. S. Court of Appeals for reconsideration, etc. (& in 33864).
- Feb. 25-71—Filed order directing that additional briefs of parties may be accepted.
- Feb. 25-71—Filed brief and appendix, appellant with proof of service (& in 33864).
- Feb. 25-71—Filed brief, appellee with proof of service (& in 33864).
- Mar. 12-71—Filed reply brief, appellant with proof of service (& in 33864).

<i>Date</i>	<i>Proceedings</i>
Mar. 12-1	—Filed reply brief, appellee with proof of service (& in 33864).
Mar. 18-71	—Argument heard (by: Lumbard ChJ & Hays, CJ & Blumenfeld, DJ) (& in 33864).
Apr. 27-71	—Judgment Reversed and Action Remanded, Lumbard, ChJ (& in 33864).
Apr. 27-71	—Dissenting in separate opinion, Hays, CJ (& in 33864).
Apr. 27-71	—Filed judgment (& in 33864).
May 5-71	—Filed copy of notice by Supreme Court denying waiver of clerk's costs.
May 12-71	—Filed motion to further stay issuance of mandate (& in 33864).
May 24-71	—Filed order granting motion to further stay issuance of mandate (& in 33864).
June 17-71	—Filed notice of Supreme Court (by Telephone) of filing of petition for writ of certiorari (& in 33864).
June 21-71	—Filed notice of filing of petition for writ of certiorari (& in 33864).
June 21-71	—Filed certificate of filing of petition for writ of certiorari (& in 33864).
July 15-71	—Filed copy of notice extending time to file a response to the petition for a writ of certiorari in Supreme Court to 9-1-71 (& in 33864).
Oct. 28-71	—Filed certified copy of order of Supreme Court granting petition for writ of certiorari (& in 33864).
Nov. 11-71	—Certified original, supplemental record and proceedings for Shearman & Sterling, Esqs. (& in 33864).

**Amended Complaint**

(EXHIBIT OMITTED)

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK**

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**[TITLE OMITTED]**

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Plaintiff, by its attorneys, Rabinowitz & Boudin, for its Amended Complaint herein, alleges:

**AS AND FOR A FIRST CAUSE OF ACTION:**

1. Plaintiff is a corporate body existing under and by virtue of the laws of the Republic of Cuba, authorized to administer the domestic and foreign credit operations of the Republic of Cuba as its agent and having its principal office in Havana, Cuba.
2. Defendant is a national banking association, duly organized and existing under the laws of the United States of America, with its principal office located in the City of New York.
3. The jurisdiction of this Court is invoked under 28 U. S. C. 1332, in that plaintiff is a foreign corporation and defendant is a citizen of the State of New York, and the amount in controversy exceeds, exclusive of interest and costs, the sum of \$10,000.
4. On or about July 8, 1958, the defendant entered into a contract with Banco de Desarrollo Economico y Social (hereinafter referred to as Bandes) and with Fondo de

Establizacion de la Moneda (hereinafter referred to as Fondo), by the terms of which the defendant loaned to Bandes the sum of \$15,000,000, for a period of one year said loan being secured by United States Government obligations, owned by Fondo, having a face value in excess of \$15,000,000. Bandes and Fondo were both autonomous institutions of the Republic of Cuba, having been duly created by the laws of said Republic. A copy of said contract is annexed hereto.

5. On or about July 8, 1959, said loan was extended for a period of one year.

6. By virtue of Laws 730 and 847, as amended, of the Republic of Cuba, dated respectively February 16, 1960 and June 30, 1960, Bandes was dissolved and the plaintiff succeeded to certain of its liabilities, including the obligation to repay the loan hereinabove referred to. The Republic of Cuba guaranteed the payment of such loan by plaintiff.

7. On July 7, 1960, plaintiff made a part payment on said loan to the extent of \$5,000,000; at the same time, the loan of the unpaid balance of \$10,000,000 was extended for an additional period of one year.

8. On September 23, 1960, the defendant advised plaintiff that the collateral held as security for the unpaid portion of the loan had been sold and the proceeds applied against the unpaid principal amount of the loan and interest thereon.

9. Upon information and belief, the amount realized by the sale of such collateral amounted to \$12,412,000; of this sum, \$10,000,000 was applied to the unpaid principal amount of the loan and \$65,000 was applied to the payment of interest on said unpaid portion of the loan for the period from July 7, 1960 to September 23, 1960, leaving a balance due and owing from defendant to plaintiff amounting to \$2,347,000.

10. On or about October 13, 1960, Fondo was dissolved by virtue of Law No. 891 of the Republic of Cuba and by virtue of said law plaintiff assumed all of the rights and obligations of Fondo.

11. By virtue of the foregoing, there is now due and owing from the defendant to the plaintiff the sum of \$2,347,000.

AS AND FOR A SECOND CAUSE OF ACTION:

12. Plaintiff repeats and realleges each and every allegation contained in paragraphs "1", "2" and "3" hereinabove.

13. Prior to October 17, 1960, Banco Gelats, Banco Pujol, Banco de San Jose, Banco Castano, Banco Asturiano de Ahorras, Banco de la Construcccion and Trust Company of Cuba were corporations organized and existing under the laws of the Republic of Cuba. For some time prior to that date, said corporations had maintained accounts in their respective names at the office of the defendant in New York City.

14. On October 17, 1960, Banco Gelats, Banco Pujol, Banco de San Jose, Banco Castano, Banco Asturiano de Ahorras, Banco de la Construcccion and Trust Company of Cuba were nationalized by virtue of Law No. 891 of the Republic of Cuba. By the terms of that law, plaintiff became the legal successor of the property and assets of said corporations.

15. Upon information and belief, on October 17, 1960, there was credited to the above mentioned accounts the following sums: To the account of Banco Gelats the sum of \$209; to the account of Banco Pujol the sum of \$248.86; to the account of Banco de San Jose the sum of \$17,783.24; to the account of Banco Castano the sum of \$683.51; to the account of Banco Asturiano de Ahorras the sum of \$73.59;

to the account of Banco de la Construcción the sum of \$101.82; and to the account of Trust Company of Cuba the sum of \$14,712.91.

16. On or about October 17, 1960, the defendant closed the said accounts and appropriated the funds therein to itself. Since that time, the defendant has refused to pay over said sums to the plaintiff, although demand therefor has been made.

17. By reason of the aforesaid, defendant is indebted to the plaintiff in the sum of \$33,812.93.

WHEREFORE, plaintiff demands judgment against defendant in the amount of \$2,380,812.93, together with interest and the costs of this action.

RABINOWITZ & BOUDIN

by VICTOR RABINOWITZ  
Attorneys for Plaintiff  
Office & P. O. Box  
25 Broad Street  
New York 4, N. Y.

[EXHIBIT OMITTED]

**Answer to Amended Complaint**

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[CAPTION OMITTED]

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Defendant The First National City Bank of New York answers the amended complaint herein as follows:

1. Defendant has no knowledge or information sufficient to form a belief as to the truth of any of the allegations contained in paragraph 1 thereof except that prior to the commencement of this action plaintiff became and at all times since then has been and now is an agent and instrumentality of the Republic of Cuba wholly owned by said Republic.

2. Admitted.

3. Defendant admits that plaintiff purports to invoke the jurisdiction of this Court under 28 U.S.C. 1332 but denies knowledge or information sufficient to form a belief as to the truth of the allegation in paragraph 3 thereof that plaintiff is a foreign corporation.

4. Defendant denies each and every allegation contained in paragraph 4 thereof except that on or about July 8, 1958 defendant entered into a contract with Banco de Desarrollo Economico y Social (referred to in the amended complaint and hereinafter as "Bandes"), Fondo de Estabilizacion de la Moneda (referred to in the amended complaint and hereinafter as "Fondo") and plaintiff; that an accurate copy of this contract is annexed to the amended complaint; and except that defendant denies knowledge or information sufficient to form a belief as to the truth of the allegation that Bandes and Fondo were both autonomous institutions of the Republic of Cuba.

5. Admitted.



6. Defendant has no knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 6 thereof.

7. Defendant denies each and every allegation contained in paragraph 7 thereof.

8. Defendant denies each and every allegation contained in paragraph 8 thereof except that on September 23, 1960 defendant sent a cable to plaintiff reading as follows:

"YOU ARE ADVISED THAT COLLATERAL HELD AS SECURITY FOR DEMAND NOTE OF BANCO DE DESARROLLO ECONOMICO Y SOCIAL, DATED JULY 8, 1958, HAS BEEN SOLD AND PROCEEDS APPLIED AGAINST PRINCIPAL AND INTEREST AND AS INDICATED IN OUR CABLE SEPTEMBER 20."

"OUR CABLE SEPTEMBER 20" referred to in said cable of September 23, 1960 was a cable which defendant has sent to plaintiff on September 20, 1960 which read as follows:

"THIS IS TO NOTIFY YOU THAT IN VIEW OF ACTION TAKEN RESPECTING OUR BRANCHES IN CUBA WE HAVE EXERCISED OUR RIGHTS OF LIEN AND OFFSET AND CLOSED YOUR ACCOUNTS AS OF SEPTEMBER 17"

9. Defendant denies each and every allegation contained in paragraph 9 thereof.

10. Defendant has no knowledge or information sufficient to form a belief as to the truth of any of the allegations contained in paragraph 10 thereof.

11. Defendant denies each and every allegation contained in paragraph 11 thereof.

12. Defendant repeats and realleges each and every allegation contained in paragraphs 1, 2 and 3 hereof.

13. Defendant admits that for some time prior to and up to on or about October 14, 1960 it maintained on its books at its head office in New York City accounts in the names of Banco Gelats, Banco Pujol, Banco de San Jose, Banco Castano, S. A., Banco Asturiano de Ahorros, S. A., Banco de la Construcccion and The Trust Company of Cuba; and except as admitted by the foregoing defendant denies knowledge or information sufficient to form a belief as to the truth of any of the allegations contained in paragraph 13 thereof.

14. Defendant has no knowledge or information sufficient to form a belief as to the truth of any of the allegations contained in paragraph 14 thereof.

15. Defendant denies each and every allegation contained in paragraph 15 thereof.

16. Defendant denies each and every allegation contained in paragraph 16 thereof.

17. Defendant denies each and every allegation contained in paragraph 17 thereof.

FOR A FIRST COMPLETE DEFENSE TO THE FIRST  
CAUSE OF ACTION IN THE AMENDED COMPLAINT  
DEFENDANT ALLEGES:

18. This action is brought by and for the benefit of the Republic of Cuba by and through its agent and wholly-owned instrumentality, the plaintiff herein, which is in fact and law and in form and function an integral part of and indistinguishable from the Republic of Cuba.

19. In and before the year 1898 the territory of the Republic of Cuba was a colony of the Kingdom of Spain. In or about April 1898 the peoples of the territory of Cuba asserted their right to independence. On or about April

20, 1898 the United States of America recognized the independence of the peoples of Cuba.

20. In consequence of such recognition the United States of America engaged in war with the Kingdom of Spain and carried on such war for and on behalf of the peoples of Cuba until the peoples of Cuba had been liberated. On December 10, 1898, the Treaty of Paris was duly executed by the United States of America and the Kingdom of Spain, and pursuant to such Treaty the Kingdom of Spain withdrew all of its forces, both military and civil, from Cuba.

21. By reason of the action of the United States of America, the peoples of Cuba were emancipated and were enabled to and did establish an autonomous government for themselves and for the area of Cuba. The United States of America recognized the autonomous government of the Republic of Cuba upon its creation and has continued to extend recognition to the successor lawful governments of the Republic of Cuba.

22. From the inception of the said independent Republic of Cuba, the laws of Cuba have provided for the private ownership of property and for the protection of rights concerning such private property; and by its establishment and administration and enforcement of such laws and otherwise, the Republic of Cuba initially and until the latter part of the year 1960 represented that it would protect and preserve all business legally established within the Republic of Cuba and all private rights acquired therein and would protect and defend all such businesses lawfully carrying out the legitimate objects thereof, and that it was and at all times would be ready, willing and able to meet all of its international commitments and otherwise conform to the Law of Nations.

23. In reliance upon the representations made by the Republic of Cuba for the protection of property and prop-

erty rights and upon its integrity, good faith and dedication to the principles of freedom, all as hereinabove set forth in paragraph 22 hereof, and pursuant to the laws of Cuba and to Section 25 of the Federal Reserve Act, the defendant, in or about August, 1915, opened a branch of its banking business in the City of Havana, Cuba, for the purpose of carrying on the business of banking in furtherance of the foreign commerce of the United States, and for the provision of banking services and facilities for the business activities of Cuba and its inhabitants and the development of its natural resources and trade, all of which comprise the economy of the Republic of Cuba; and in further reliance on said representations, defendant continued to invest in the Republic of Cuba, additional funds and to open and operate additional branches, and on September 16, 1960 defendant maintained and operated eleven distinct and separate branches within the Republic of Cuba.

24. In 1958 the Republic of Cuba applied to the defendant for financial assistance in the form of a loan of United States dollars to be used for governmental purposes of said Republic of Cuba. On or about July 8, 1958, in response to this request, defendant entered into a credit agreement, a copy of which is annexed to the amended complaint, with three agencies or instrumentalities of the Republic of Cuba, designated by it for the purpose, namely, Bandes, Fondo and plaintiff, which agreement provided for a loan by defendant to Bandes of the sum of \$15,000,000, such loan to be secured by obligations of the United States Government and of the International Bank for Reconstruction and Development (hereinafter called "the collateral") pledged with the defendant for such purpose by the Republic of Cuba through its agents and instrumentalities, Fondo and plaintiff; and on or about July 8, 1958, at its head office in the City of New York, the defendant received said collateral in pledge and made the loan of \$15,000,000 to the Republic of Cuba through its agency and instrumentality, Bandes.

25. On or about December 31, 1958 a new government calling itself the Revolutionary Government of Cuba and being under the leadership of one Fidel Castro assumed de facto control of the Republic of Cuba and on or about January 7, 1959 the United States of America formally extended recognition to Castro's Revolutionary Government.

26. Subsequent to January 7, 1959, the Republic of Cuba formally and expressly reaffirmed its representations, assurances and guaranties with respect to the preservation of private property and with respect to the other matters set forth in paragraph 22 hereof, and to this end on or about February 17, 1959 the Republic of Cuba by the said Revolutionary Government promulgated the Fundamental Law of Cuba, Articles 24 and 87 of which provided and still provide, in English translation, as follows:

"Article 24. Confiscation of property is prohibited, but it is authorized for the property of the Tyrant deposed on December 31, 1958 and of his collaborators, of natural or juridical persons responsible for crimes committed against the national economy or the public treasury, and those who are enriched or have been enriched unlawfully under the protection of the public power. No other natural or juridical person can be deprived of his property except by competent judicial authority and for a justifiable reason of public benefit or social interest and always after payment of appropriate compensation in cash, fixed by court action. Non-compliance with these requirements shall give the person whose property has been expropriated the right to protection by the courts and, if the case warrants, to restitution of his property.

"The reality of the grounds for public benefit or social interest and the need for expropriation shall be decided by the courts in the event of challenge."

"Article 87. The Cuban State recognizes the existence and legitimacy of private property in its broadest concept as a social function and without other limitations than those which, for reasons of public necessity or social interest, are imposed by law."

27. In or about July 1959 the Republic of Cuba, through its agent and instrumentality Bandes, requested the defendant to forbear collection of the loan previously referred to for a period of one year; and in reliance upon the representations described in paragraphs 22 and 26 hereof the defendant acquiesced in such request.

28. In or about July 1960 the Republic of Cuba, through its agent and instrumentality, the plaintiff herein, proposed to pay to the defendant on or before July 8, 1960 \$5,000,000 of the indebtedness incurred as alleged in paragraph 24 hereof and requested that a proportionate amount of the collateral be released and that demand for the balance be deferred for a period of a year; and the defendant, in reliance upon the representations as set forth in paragraphs 22 and 26 hereof, and upon the express proviso that the continuance of the loan was predicated on a continuance of the then existing conditions, acquiesced in such request by the Republic of Cuba.

29. On September 16 and 17, 1960, the Republic of Cuba forceably seized and took from the defendant all of the branch offices and the business and property of defendant in the Republic of Cuba, and declared itself substituted for and subrogated in place and stead of the defendant with respect to such property and rights as well as the entire assets and liabilities of defendant within the Republic of Cuba, without the consent of the defendant but against its will, and without compensation of any sort whatsoever.

30. Thereafter the Government of the United States of America protested against the action alleged in paragraph 29 hereof and declared such action to have been forced expropriation taken under color of a discriminatory, confiscatory and arbitrary law.

31. After September 17, 1960 defendant sold the collateral and applied the net amount realized upon said sale to the then unpaid principal amount of the loan and to the interest then accrued and unpaid on said loan, and applied the balance as an offset to its claim against the Republic of Cuba for the value of its property seized by the Republic of Cuba.

32. On January 3, 1961 the Government of the United States severed diplomatic relations with the Government of the Republic of Cuba on the ground that the harassment and vilification by the said Government of the Republic of Cuba had passed endurance and thus indicated that the normal courtesies extended between friendly nations would not be continued as to the Republic of Cuba.

33. The seizure by the Republic of Cuba of the defendant's property within the territory of the Republic of Cuba as alleged in paragraph 29 hereof was discriminatory, confiscatory and in violation of international law, and the laws of the United States, and the laws of the Republic of Cuba itself.

34. In this action the Republic of Cuba, through its agent and wholly-owned instrumentality the plaintiff herein, seeks to recover from the defendant a sum of money, the amount of which can be determined only in an accounting in equity. The Republic of Cuba is therefore seeking equitable relief and by reason of the tortious acts of the Republic of Cuba is seizing defendant's property and the violation by the Republic of Cuba of its assurances respecting the protection of private property and its own laws and



international law with respect thereto, all as more fully hereinabove set forth, the Republic of Cuba, including its agent and instrumentality the plaintiff herein, comes into this Court with unclean hands and is not entitled to any equitable relief and the action must be dismissed.

FOR A SECOND COMPLETE DEFENSE TO THE FIRST CAUSE OF ACTION IN THE AMENDED COMPLAINT AND AS A SETOFF AND COUNTERCLAIM THE DEFENDANT ALLEGES:

35. It repeats and realleges each and every allegation set forth in paragraphs 18 through 33 hereof.

36. By reason of the matters hereinbefore set forth, the defendant has been damaged by the wrongful and tortious acts of the Republic of Cuba in an amount substantially in excess of the amount claimed in the first cause of action of the amended complaint herein but at present indeterminable, and the defendant is entitled to setoff against such damages the amount claimed in the first cause of action of the amended complaint herein, leaving a balance due and owing from the Republic of Cuba to the defendant.

FOR A THIRD COMPLETE DEFENSE TO THE FIRST CAUSE OF ACTION IN THE AMENDED COMPLAINT AND AS A SETOFF AND COUNTERCLAIM DEFENDANT ALLEGES:

37. It repeats and realleges each and every allegation set forth in paragraphs 18 through 33 hereof.

38. The reasonable value of the business and property of defendant in the Republic of Cuba, at the time of the seizure thereof by the Republic of Cuba, was substantially in excess of the amount claimed in the first cause of action of the amended complaint herein. The Republic of Cuba promised to and was obligated by international law to pay prompt, adequate and effective compensation to defendant and others whose property it seized.



39. No part of such compensation has been paid to defendant but, on the contrary, the Republic of Cuba has repudiated its obligation to make such payment and has waived the necessity of any demand therefor.

40. By reason of the matters hereinbefore alleged, the Republic of Cuba is indebted to the defendant in an amount substantially in excess of the amount claimed in the first cause of action of the amended complaint herein but at present indeterminable, and the defendant is entitled to setoff against such indebtedness the amount claimed in the first cause of action of the amended complaint herein, leaving a balance due and owing from the Republic of Cuba to the defendant.

FOR A FOURTH COMPLETE DEFENSE TO THE FIRST CAUSE  
OF ACTION IN THE AMENDED COMPLAINT  
DEFENDANT ALLEGES:

41. The real party in interest is not Banco Nacional de Cuba, the plaintiff herein, but the Republic of Cuba. The action must be dismissed because it is not being prosecuted in the name of the real party in interest.

FOR A FIRST COMPLETE DEFENSE TO THE SECOND CAUSE  
OF ACTION IN THE AMENDED COMPLAINT AND AS A  
SETOFF AND COUNTERCLAIM DEFENDANT ALLEGES:

42. Defendant repeats and realleges each and every allegation contained in paragraphs 18-23, inclusive, 25, 26, 29 and 30 hereof.

43. On or about October 14, 1960 the Republic of Cuba purported to enact its Law No. 891 pursuant to which all private Cuban banks were purportedly nationalized by the Republic of Cuba and their assets, including deposits in foreign countries, were purportedly taken over by the Republic of Cuba.

44. On or about October 14, 1960 defendant was advised of the purported enactment of said Law No. 891 and thereupon applied the balances standing to the credit of the accounts in the names of Banco Gelats, Banco Pujol, Banco de San Jose, Banco Castano, S. A., Banco Asturiano de Ahorros, S. A., Banco de la Construcción and The Trust Company of Cuba as an offset to its claim against the Republic of Cuba for the value of its property seized by the Republic of Cuba.

45. Defendant repeats and realleges each and every allegation contained in paragraphs 32 and 33 hereof.

46. By reason of the matters hereinbefore set forth, defendant has been damaged by the wrongful and tortious acts of the Republic of Cuba in an amount substantially in excess of the amount claimed in the second cause of action of the amended complaint herein but at present indeterminable, and defendant is entitled to setoff against such damages the amount claimed in the second cause of action of the amended complaint herein, leaving a balance due and owing from the Republic of Cuba to the defendant.

**FOR A SECOND COMPLETE DEFENSE TO THE SECOND CAUSE  
OF ACTION IN THE AMENDED COMPLAINT AND AS A  
SETOFF AND COUNTERCLAIM DEFENDANT ALLEGES:**

47. Defendant repeats and realleges each and every allegation contained in paragraphs 42-45 hereof, inclusive.

48. The reasonable value of the business and property of defendant in the Republic of Cuba, at the time of the seizure thereof by the Republic of Cuba, was substantially in excess of the amount claimed in the second cause of action of the amended complaint herein. The Republic of Cuba promised to and was obligated by international law to pay prompt, adequate and effective compensation to defendant and others whose property is seized.

49. No part of such compensation has been paid to defendant but, on the contrary, the Republic of Cuba has repudiated its obligation to make such payment and has waived the necessity of any demand therefor.

50. By reason of the matters hereinbefore alleged, the Republic of Cuba is indebted to the defendant in an amount substantially in excess of the amount claimed in the second cause of action of the amended complaint herein but at present indeterminable, and the defendant is entitled to setoff against such indebtedness the amount claimed in the second cause of action of the amended complaint herein, leaving a balance due and owing from the Republic of Cuba to the defendant.

FOR A THIRD COMPLETE DEFENSE TO THE SECOND CAUSE  
OF ACTION IN THE AMENDED COMPLAINT  
DEFENDANT ALLEGES:

51. Plaintiff's second cause of action is based upon a claim of right, title and interest in plaintiff to certain assets of those private Cuban banks which are named in paragraphs 13 and 14 of the amended complaint herein. Plaintiff claims to be entitled to these certain assets not as a result of any voluntary act of said private Cuban banks but solely as a result of the purported enactment by the Republic of Cuba of its Law No. 891.

52. Those certain assets which plaintiff is attempting to recover by its second cause of action herein are debts payable in the City and State of New York which were on the date of the purported enactment of said Law No. 891 and still are represented by deposit balances in bank accounts maintained by said private Cuban banks with defendant in the City and State of New York and which constitute property located within said City and State.

53. The said alleged Law No. 891 of the Republic of Cuba is by its terms a confiscatory decree and the Republic

of Cuba has not paid or tendered prompt, adequate and effective compensation to the owners of said private Cuban banks for the forced expropriation of their property through which plaintiff claims to derive its right, title and interest as alleged in its second cause of action herein.

54. It is contrary to the public policy of the State of New York to enforce a confiscatory decree with respect to property located within the State of New York at the date of the decree and the second cause of action therefore fails to state a claim upon which relief to plaintiff can be granted.

FOR A FOURTH COMPLETE DEFENSE TO THE SECOND CAUSE  
OF ACTION IN THE AMENDED COMPLAINT  
DEFENDANT ALLEGES:

55. The real parties in interest are Banco Gelats, Banco Pujol, Banco de San Jose, Banco Castano, S.A., Banco Asturiano de Ahorros, S.A., Banco de la Construcción and The Trust Company of Cuba and not Banco Nacional de Cuba, the plaintiff herein. The action must be dismissed because it is not being prosecuted in the name of the real parties in interest.

FOR A FIFTH COMPLETE DEFENSE TO THE SECOND CAUSE  
OF ACTION IN THE AMENDED COMPLAINT  
DEFENDANT ALLEGES:

56. The real party in interest is not Banco Nacional de Cuba, the plaintiff herein, but the Republic of Cuba. The action must be dismissed because it is not being prosecuted in the name of the real party in interest.

WHEREFORE, the defendant demands judgment herein

1. Dismissing this action with prejudice;

2. Adjudicating that the Republic of Cuba is liable to the defendant in an amount in excess of the amount specified in the amended complaint herein, without prejudice to the defendant's rights at any subsequent time, through diplomatic channels or in an international forum, in any forum in any foreign nation, or in any court in the United States, to assert such liability of the Republic of Cuba either through affirmative relief or as a matter of defense, offset, counterclaim, or by such other means as may from time to time be available to it;

3. For such other, further and different relief as to the Court may seem just.

Dated: New York, N.Y.  
March 6, 1961

SHEARMAN & STERLING & WRIGHT

By HARRY HARFIELD  
Member of the Firm  
Attorneys for Defendant  
20 Exchange Place  
New York 5, N.Y.

## Second Amended Reply of Plaintiff

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[CAPTION OMITTED]

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Plaintiff, for its second amended reply, alleges:

AS A REPLY TO THE FIRST COUNTERCLAIM ALLEGED  
IN PARAGRAPHS 35 AND 36 OF THE ANSWER TO THE  
AMENDED COMPLAINT, THE PLAINTIFF:

1. Denies each and every allegation contained in paragraphs 18, 30, 33, 34 and 36 of the answer.

2. The allegations contained in paragraphs 19, 20, 21 and 22 of the answer all relate to historical facts allegedly occurring prior to the establishment of plaintiff and to matters not within the corporate knowledge of the plaintiff or the personal knowledge or memory of its officers. Therefore, the plaintiff denies knowledge or information sufficient to form a belief as to the allegations of said paragraphs.

3. Denies each and every allegation contained in paragraph 23 of the answer, except admits that the defendant, in or about August, 1915, opened a branch of its banking business in the City of Havana, Cuba; that among the purposes of such branch was to carry on the business of banking; and that on September 16, 1960, defendant maintained and operated 11 branches within the Republic of Cuba.

4. Denies each and every allegation in paragraph 24 of the answer, except admits that in 1958 defendant entered into an agreement, a copy of which is annexed to the amended complaint; plaintiff refers to the said copy of the agreement for the terms thereof.

5. Denies each and every allegation contained in paragraph 25 of the answer, except admits that on or about

January 7, 1959, the United States of America formally extended recognition to the present government of Cuba.

6. Denies each and every allegation contained in paragraph 26 of the answer, except admits that on or about February 17, 1959, the Republic of Cuba promulgated a law entitled "Fundamental Law"; plaintiff refers to said law for its contents.

7. Denies each and every allegation contained in paragraph 27 of the answer, except admits that in or about July of 1959, the loan which was the subject matter of the agreement hereinabove referred to was extended for a period of one year.

8. Denies each and every allegation contained in paragraph 28 of the answer, except admits that in or about July, 1960, plaintiff proposed to and did pay to the defendant \$5,000,000. of the indebtedness incurred pursuant to the aforementioned agreement and requested that a proportionate amount of collateral be released and that the balance of the loan be extended for a period of one year.

9. Denies each and every allegation contained in paragraph 29 of the answer, except admits that on or about September 16, 1960, the business and property of the defendant in the Republic of Cuba was nationalized.

10. Denies each and every allegation contained in paragraph 31 of the answer, except admits that after September 17, 1960, defendant sold the collateral held as security for the unpaid portion of the loan.

11. Denies each and every allegation contained in paragraph 32 of the answer, except admits that on January 3, 1961, the Government of the United States severed diplomatic relations with the Government of the Republic of Cuba.



AS A REPLY TO THE SECOND COUNTERCLAIM ALLEGED IN PARAGRAPHS 37 THROUGH 40 INCLUSIVE OF THE ANSWER TO THE AMENDED COMPLAINT, THE PLAINTIFF:

12. Repeats and realleges each of the denials and admissions set forth in paragraphs 1 through 11 inclusive hereinabove.

13. Denies each and every allegation contained in paragraphs 38, 39 and 40 of the answer.

AS A REPLY TO THE THIRD COUNTERCLAIM ALLEGED IN PARAGRAPHS 42 THROUGH 46 INCLUSIVE OF THE ANSWER TO THE AMENDED COMPLAINT, THE PLAINTIFF:

14. Repeats and realleges each of the denials and admissions set forth in paragraphs 1, 2, 3, 5, 6 and 9 hereinabove.

15. Denies each and every allegation contained in paragraphs 30, 33 and 46 of the answer.

16. Denies each and every allegation contained in paragraph 43 of the answer, except admits that on or about October 14, 1960, the Republic of Cuba enacted Law No. 891 and plaintiff refers to that law for the contents thereof.

17. Denies each and every allegation contained in paragraph 44 of the answer, except admits that on or about October 14, 1960, the defendant seized balances standing to the credit of the accounts in the names of Banco Gelats, Banco Pujol, Banco de San Jose, Banco Castano S.A., Banco Asturiano de Ahorros, S.A., Banco de la Construcion and the Trust Company of Cuba.

18. Denies each and every allegation contained in paragraph 32 of the answer, except admits that on January 3, 1961, the Government of the United States severed diplomatic relations with the Government of the Republic of Cuba.



AS AND FOR A REPLY TO THE FOURTH COUNTERCLAIM  
ALLEGED IN PARAGRAPHS 47 THROUGH 50 INCLUSIVE OF  
THE ANSWER TO THE AMENDED COMPLAINT,  
THE PLAINTIFF:

19. Repeats and realleges each and every allegation contained in paragraphs 14 through 18 inclusive herein-above.

20. Denies each and every allegation contained in paragraphs 48, 49 and 50 of the answer.

AS AND FOR A FIRST, AFFIRMATIVE DEFENSE TO EACH  
OF THE COUNTERCLAIMS ALLEGED BY DEFENDANT IN ITS  
ANSWER TO THE AMENDED COMPLAINT, THE  
PLAINTIFF ALLEGES:

21. The allegations set forth in each of said counterclaims do not state claims upon which relief can be granted.

AS AND FOR A SECOND, AFFIRMATIVE DEFENSE TO EACH  
OF THE COUNTERCLAIMS ALLEGED BY DEFENDANT IN ITS  
ANSWER TO THE AMENDED COMPLAINT, THE  
PLAINTIFF ALLEGES:

22. Plaintiff is an autonomous financial institution which, under the laws of the Republic of Cuba, is not responsible for the obligations of the Republic of Cuba.

AS AND FOR A THIRD, AFFIRMATIVE DEFENSE TO EACH  
OF THE COUNTERCLAIMS ALLEGED BY DEFENDANT IN ITS  
ANSWER TO THE AMENDED COMPLAINT, THE  
PLAINTIFF ALLEGES:

23. To the extent, if any, to which plaintiff may be responsible for the obligations of the Republic of Cuba, it is entitled to immunity from a suit in a court of the United States.

AS A PARTIAL DEFENSE TO EACH OF THE COUNTERCLAIMS  
ALLEGED BY DEFENDANT IN ITS ANSWER TO THE  
AMENDED COMPLAINT:

24. Plaintiff realleges each and every allegation contained in paragraph 23 hereof.

WHEREFORE, plaintiff demands judgment against the defendant:

- (a) Dismissing defendant's counterclaims;
- (b) Awarding judgment to the plaintiff in the sum demanded by the complaint; and
- (c) Awarding the plaintiff interest and the costs and disbursements of this action.

Dated: New York, N.Y.  
August 1, 1961

RABINOWITZ & BOUDIN

by VICTOR RABINOWITZ  
Member of the Firm  
Attorneys for Plaintiff  
25 Broad Street  
New York 4, N. Y.

**Opinion and Order, Dated July 20, 1967  
and Entered July 21, 1967**

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT, NEW YORK

July 20, 1967

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BANCO NACIONAL DE CUBA,

*Plaintiff,*

*v.*

THE FIRST NATIONAL CITY BANK OF NEW YORK,

*Defendant.*

No. 60 Civ. 4664.

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Shearman & Sterling, New York City, for defendant;  
Henry Harfield, Charles C. Parlin, Jr., William Harvey  
Reeves, New York City, of counsel.

Rabinowitz & Boudin, New York City, for plaintiff;  
Victor Rabinowitz, Mary M. Kaufman, Henry Winestine,  
Eleanor Fischer, New York City, of counsel.

**Opinion**

FREDERICK VAN PELT BRYAN, *District Judge:*

This action by Banco Nacional of Cuba (Banco Nacional), the financial agent of the Government of Cuba, against The First National City Bank of New York (First National City) is one of the numerous cases before me raising issues arising out of confiscations of American-owned property in Cuba by the Castro Government.

The amended complaint alleges two claims for relief, the first for the excess realized by First National City on the sale of collateral held as security for a loan, and the second for deposits by nationalized Cuban banks in First National

City in New York. The answer pleads a series of defenses, set-offs and counterclaims based principally on the confiscation of First National City's Cuban branches. First National City has now moved for summary judgment pursuant to Rule 56(a), F.R.C.P., and Banco Nacional has cross-moved for the same relief on the first claim and for judgment dismissing the counterclaims. Rule 56(b).

## I.

The facts giving rise to the first claim for relief are not in serious dispute. On July 8, 1958, First National City, a New York banking corporation doing business in New York and throughout the world, made a loan of fifteen million dollars to Banco de Desarrollo Economico y Social (Bandes), a governmental corporate agency of the Republic of Cuba. The loan was secured by United States Government bonds and obligations of the International Bank of Reconstruction and Development pledged to First National City by Fondo de Estabilizacion de La Moneda (Fondo), another Cuban governmental agency, and Banco Nacional. On January 1, 1959, the Castro Government took control of the Republic of Cuba. The fifteen million dollar loan to Bandes was renewed for another year on July 8, 1959. Thereafter by virtue of Cuban Law No. 730, February 16, 1960, and Law No. 847, June 30, 1960, Bandes was dissolved and Banco Nacional succeeded to the rights and obligations with which we are concerned in this action, including the obligation to repay the loan. The Republic of Cuba guaranteed repayment. On July 7, 1960, the terms of the loan were renegotiated for the last time. Banco Nacional repaid five million dollars, and requested and obtained an agreement from First National City to defer demand for the balance of ten million dollars for one year. A proportionate amount of collateral was then released.

September 16, 1960, however, marked the date of an irreparable breach of the relationship between these parties. On that day the Cuban militia seized all eleven of First National City's branches located in Cuba. On the following

day the issuance of Executive Power Resolution No. 2 left no uncertainty as to the permanent nature of these confiscations; under the terms of the resolution the Cuban State was declared "subrogated" to all of First National City's rights, obligations, and liabilities.<sup>1</sup>

In the light of this turn of events First National City, on September 23, 1960, sold the collateral it held as security for the unpaid portion of the loan and applied the proceeds in payment of the principal obligation and accrued interest. Defendant concedes—and plaintiff for purposes of this motion does not deny—that the amount realized on the sale of collateral exceeded by \$1,810,880.51 the ten million dollars of unpaid principal and the \$65,000 interest then due.<sup>2</sup> The first claim for relief seeks judgment for the amount of the excess.

The answer of First National City to the first claim alleges in substance that the Republic of Cuba is the real party in interest in this action, that the Cuban government is indebted to the defendant in an amount exceeding the sum demanded in the amended complaint by reason of the confiscation of its Cuban property, and that therefore the defendant is entitled to set off this outstanding obligation as a complete defense to the claims asserted by Banco Nacional. First National City has also interposed an affirmative counterclaim for the amount of the excess, and seeks dismissal of plaintiff's claim with prejudice. Both parties recognize that this court on the present papers cannot determine the value of First National City's Cuban properties which have been confiscated. But apart from this issue of fact the basic questions in this case are posed by the motions before me.

The ultimate legal issues on the first claim are clearly drawn. Banco Nacional strenuously contends that the affirmative counterclaim and the set-off by way of defense are

<sup>1</sup> See note 6, *infra*.

<sup>2</sup> The amount sought in the first count of the amended complaint was \$2,347,000.

barred, alternatively, by principles of sovereign immunity and the act of state doctrine. The dispositive question is simply whether defendant is precluded on those grounds from asserting—either affirmatively or by way of set-off as a complete defense—a claim for the value of its confiscated Cuban properties.

## II. *Sovereign Immunity*

There is no serious question that the Government of Cuba and Banco Nacional are one and the same for purposes of this litigation.<sup>3</sup> And as a general rule a state which initiates proceedings in a court of another sovereignty waives immunity from a counterclaim or set-off to the extent that it does not exceed the amount of the state's claims. ALI, Restatement (Second), Foreign Relations Law of the United States § 70(2)(a) (1965). This waiver extends to defensive counterclaims which do not arise out of the subject matter of the claims of the state which initiated the

<sup>3</sup> Plaintiff at various times has argued that defendant's claim against the Cuban government cannot be asserted against Banco Nacional, an entirely separate entity. This position is, of course, flatly inconsistent with the sovereign immunity argument. Moreover, throughout the *Sabbatino* litigation it was recognized by every court concerned that Banco Nacional De Cuba was an instrumentality of the Cuban government. *Banco Nacional v. Sabbatino*, 193 F. Supp. 375 (S.D. N.Y. 1961), *aff'd*, 307 F.2d 845 (2d Cir. 1962), *rev'd*, 376 U.S. 398, 84 S. Ct. 923, 11 L. Ed. 2d 804 (1964). As Judge Weinfeld pointed out the complaint there alleged that plaintiff was a "public corporation wholly owned by the government." *Banco Nacional De Cuba v. Sabbatino*, 27 F.R.D. 255, 258 (S.D. N.Y. 1961). The present amended complaint alleges only that plaintiff "is a corporate body existing under \* \* \* the laws of the Republic of Cuba, authorized to administer the domestic and foreign credit operations of the Republic of Cuba as its agent and having its principal office in Havana, Cuba." But any doubts as to the organic relationship between plaintiff and the Cuban government are removed by an examination of the local laws defining the function and authority of Banco Nacional. Plaintiff alone has exclusive charge of directing the banking function of the state. Law No. 891, arts. 1, 2, 3, Oct. 14, 1960. And it is plaintiff who shall exercise "the monetary sovereignty of the Nation." Law No. 930, art. 1, Feb. 23, 1961. The Government of Cuba and Banco Nacional are indistinguishable entities for purposes of this lawsuit. Compare *Dexter & Carpenter, Inc. v. Kunglig Jarnvagsstyrelsen*, 43 F.2d 705 (2d Cir. 1930).

action. *National City Bank of New York v. Republic of China*, 348 U.S. 356, 75 S. Ct. 423, 99 L. Ed. 389 (1955); *Wacker v. Bisson*, 348 F.2d 602, 610 (5th Cir. 1965); *American Hawaiian Ventures, Inc. v. M. V. J. Latuharhary*, 257 F. Supp. 622, 626-627 (D. N.J. 1966); See *Dexter & Carpenter, Inc. v. Kunglig Jarnvagsstyrelsen*, 43 F.2d 705 (2d Cir. 1930). The ultimate policy reason for this is simply that "fairness has been thought to require that when the sovereign seeks recovery, it be subject to legitimate counterclaims against it." *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 438, 84 S. Ct. 923, 945, 11 L. Ed. 2d 804 (1964); see *Pugh & McLaughlin, Jurisdictional Immunities of Foreign States*, 41 N.Y.U. L. Rev. 25, 53-54 (1966).

So viewed, there is no doubt that the assertion of First National City's defensive counterclaim as a set-off is not barred because plaintiff happens to be an instrumentality of the Cuban government. When a foreign government institutes suit in the courts of this country, it can expect nothing more and nothing less than substantial justice between the parties. Since the decision in *National City Bank of New York v. Republic of China* a suit brought by a foreign government is no longer a one-way street. The doctrine of sovereign immunity cannot be raised in this court as a technical bar to any legitimate defensive counterclaims or set-offs advanced by First National City.<sup>4</sup> Whether the defendant has such legitimate defenses—and if so in what amount—are, of course, entirely separate questions.<sup>5</sup>

<sup>4</sup> *Pons v. Republic of Cuba*, 111 U.S. App. D.C. 141, 294 F.2d 925 (1961), cert. den., 368 U.S. 960, 82 S. Ct. 406, 7 L. Ed. 2d 392 (1962), is not to the contrary because the party there aggrieved by the Cuban confiscation was a Cuban national.

<sup>5</sup> As mentioned, First National City has also interposed an affirmative counter-claim to recover the amount by which the compensation for the confiscations exceeds the \$1,810,880.51 figure. I hold, however, that plaintiff's limited waiver of immunity by instituting this suit permits only the assertion of a defensive counterclaim that "does not exceed the amount of the state's claims." Restatement (Second), Foreign Relations Law of the United States § 70(2)(a) (1965).



### III. *The Act of State Doctrine.*

The basis for defendant's set-off is that the Government of Cuba, in whose shoes Banco Nacional stands, confiscated eleven of First National City's Cuban branches without compensation and in violation of international law. Under *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 84 S. Ct. 923, 11 L. Ed. 2d 804 (1964), inquiry into the legality *vel non* of the expropriations here involved would be foreclosed by the act of state doctrine which forbids the courts of one country from sitting "in judgment on the acts of the government of another, done within its own territory." 376 U.S. at 416, 84 S. Ct. at 934, quoting *Underhill v. Hernandez*, 168 U.S. 250, 252, 18 S. Ct. 83, 42 L. Ed. 456 (1897). However, the holding in *Sabbatino* was for all practical purposes overruled by the Hickenlooper amendment to the Foreign Assistance Act of 1964, 22 U.S.C. § 2370(e)(2), as amended 79 Stat. 658-659 (Sept. 6, 1965), the constitutionality of which has been upheld. *Banco Nacional de Cuba v. Farr*, 243 F. Supp. 957 (S.D. N.Y. 1965), *aff'd*, July 31, 1967 (2d Cir.). Congress there declared that the courts of this country should not refrain, on the ground of the act of state doctrine, from determining the merits in cases involving a confiscation after January 1, 1959, by an act of a foreign state "in violation of the principles of international law, including the principles of compensation." The Hickenlooper amendment specifically stated that it did not apply "in any case in which an act of a foreign state is not contrary to international law".

The ultimate act of state doctrine issue boils down to whether the confiscation of First National City's Cuban property violated principles of international law. In my view the seizures here involved had precisely this effect for a combination of reasons.

In the first place the various decrees authorizing the confiscations did not provide for adequate payments to First National City. The scheme of "illusory compensation" outlined by Judge Waterman in *Sabbatino*, 307 F.2d



at 862, has been totally ineffective in practice in the intervening years. No compensation whatsoever appears to have been forthcoming and none can reasonably be expected in the foreseeable future.

It is true that both the Second Circuit and the Supreme Court in *Sabbatino* pointedly refrained from resolving the delicate question of whether the mere failure, without more, to provide adequate compensation to aliens whose property has been expropriated constitutes a breach of international law. 376 U.S. at 428-430, 84 S. Ct. 923; 307 F.2d at 862-864. But Congressional passage of the Hickenlooper Amendment has removed any doubt on this score—at least insofar as the courts of this country are concerned. While the reference to the “principles of compensation” in 22 U.S.C. § 2370(e)(2) is somewhat open-ended because it does not state specifically that compensation is a *sine qua non* of full compliance with international law, subsection (1) of the same statute leaves no doubt as to the views of Congress on the subject. That provision requires the suspension of assistance under the foreign aid program to the government of any state which, after effectuating the confiscation of property that is at least 50 percent owned by United States citizens or corporations, “fails within a reasonable time \* \* \* to take appropriate steps \* \* \* to discharge its obligations under international law toward such citizen or entity, including speedy compensation for such property in convertible foreign exchange, equivalent to the full value thereof, as required by international law”. The legislative history of the Hickenlooper Amendment and its extensions is replete with statements reaffirming what is plain on the face of the legislation, i.e., that international law, at least from the parochial point of view of the United States, requires full compensation for seizures of American-owned property. S. Rep. No. 170, 89th Cong., 1st Sess. at 19; 110 Cong. Rec. 18936-37, 18946 (Aug. 14, 1964); 110 Cong. Rec. App. A5157 (daily ed. Oct. 7, 1964) (Senator Hickenlooper’s Statement on Conference Report); see 22 U.S.C. § 2370(a)(2).

It is clear to me that this rule of compensation legislatively announced by Congress is fully consistent with generally accepted principles of international law established by the authorities reviewed by the appellate courts in *Sabbatino*. It is therefore unnecessary to reiterate the settled proposition that "the rules of international law \* \* \* are subject to the express acts of Congress." *United States ex rel. Pfefer v. Bell*, 248 F. 992 995 (E.D. N.Y. 1918). This court would accordingly be bound to apply the provisions of the Hickenlooper Amendment even if they were found to be inconsistent with the views of other nations on international law, though that is not so here. See *The Nereide*, 13 U.S. (9 Cranch) 388, 423, 3 L. Ed. 769 (1815); *Paquette Habana*, 175 U.S. 677, 700, 20 S. Ct. 290, 44 L. Ed. 320 (1900); *United States v. Siem*, 299 F. 582, 583 (9th Cir. 1924); *Schroeder v. Bissell*, 5 F.2d 838 (D. Conn. 1925); Reeves, *The Sabbatino Case and the Sabbatino Amendment: Comedy—or Tragedy of Errors*, 20 Vand. L. Rev. 429, 492-93 (1967).

There is more to this case, however, than a naked failure by the Cuban government to comply with general principles of compensation. Violations of international law spring from other sources also. The September 16, 1960, takeover of First National City's branch banks in Cuba had all the earmarks of the seizure of American-owned properties which Judge Waterman in *Sabbatino* condemned as violative of international law for reasons apart from the failure to provide compensation. Here, as in *Sabbatino*, the expropriations were consummated under Cuban Law No. 851, July 6, 1960, which granted the government *carte blanche* authority to confiscate all properties owned by nationals of the United States. As Judge Waterman pointed out, see 307 F.2d at 865 n. 14, this law plainly was passed as a retaliatory measure against the United States Government's reduction of the sugar quota allotted to Cuba. On September 17, 1960, the day after the Cuban militia seized defendant's branches, the Cuban government issued Executive Power Resolution No. 2, which, like Resolution No. 1 in-

volved in *Sabbatino*, justified the seizures of American-owned property as retaliation for an "act of cowardly and criminal aggression," that is, the reduction of the sugar quota.<sup>6</sup>

<sup>6</sup> The vitriolic language of Resolution No. 2, Def. Ex. 22, left no doubt as to the retaliatory and discriminatory motivation for the bank seizures:

"Whereas: Law No. 851 of July 6, 1960, published in the *Gaceta Oficial* of July 7, authorized the undersigned to order jointly, whenever they consider it necessary to the defense of the national interest, the nationalization, by means of expropriation, of the assets and companies owned by natural or juristic persons who are nationals of the United States of America, or of companies in which the said persons have an interest or participation, even though the said companies were constituted in accordance with Cuban laws.

Whereas: It is not possible to allow a large share of the nation's banking to remain in the hands of the imperialist interests which, in an act of cowardly and criminal aggression, inspired the reduction of our sugar quota.

Whereas: Subsequent to the reduction of the sugar quota, the Government of the United States of America and the representatives of monopolistic interest of that country repeatedly committed acts of open aggression against the Cuban economy, such as those involving the curtailment of trade between the two countries, which had the obvious purpose of hampering the economic development of Cuba; and the imposition of embargoes on commercial aircraft owned by Cuban companies, under the legal guise of claims against civil debts, but which have the implicit purpose of curtailing our vital means of international communication, in an increasingly greater effort to isolate our country.

Whereas: One of the most efficient instruments of that imperialistic interference in our historical development has been typified by the operations of the American commercial banks, which have served as a financial vehicle to facilitate the monopolistic activities of the American companies in Cuba and the massive invasion of our country by imperialistic capital through usurious loans, which, far from promoting our economic growth, brought about in times of emergency numerous lawsuits resulting in the seizure of our national wealth by that imperialistic capital.

Whereas: It has always been the financial policy of these banks to encourage the activities of the American companies that devote their efforts to the procurement of our natural resources, the exploitation of our land by holders of large estates, and the mercantile operations that have contributed to the growing trend toward importing American manufactured goods, to the extent that it has hindered the development of national industries and has forced our economy to become dependent on a single crop and a single export.

"[C]onfiscation without compensation when the expropriation is an act of reprisal does not have significant support among disinterested international law commentators from any country." 307 F.2d at 866. Thus the allegations in the decrees that the general public interest necessitated the seizures of First National City's property must be discounted when the manifest purpose of the confiscations was political retaliation of the rankest sort.

Moreover, as in *Sabbatino*, the reprisals involved in this case evidently evince discrimination rising to the level of a violation of international law. Not only was Law No. 851 aimed solely at United States Nationals, but also a general confiscation of the remaining Cuban banking properties did not take place until October 14, 1960,<sup>7</sup> almost a month after First National City's branches were seized. Even then the end result was not that Cuban-owned enterprises and American-owned enterprises were treated alike, compare 307 F.2d at 845, because the compensation provisions for Americans, unlike those for Cuban citizens, were entirely

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Whereas: All this proves that the activities of American banks in Cuba have been a decisive factor in the disruption of our economic structure.

Whereas: It is unquestionable that the continuation of American banking interests in Cuba, a typical example of the imperialistic phenomenon, constitutes an obstacle to national liberation.

Whereas: In addition to the facts already stated, there is the deliberate practice of the United States Government designed to facilitate and to encourage, within its own territory, counter-revolutionary activities by war criminals and fugitive traitors.

Whereas: Furthermore, the work of international espionage in Cuban territory has been intensified under the sponsorship of that Government, with notorious contempt for international law and with the obvious intention of promoting conspirational activities in our country.

Whereas: All these acts are undertaken for the purpose of destroying the great achievements of the Cuban Revolution, in the wicked hope of again subjecting our country to imperialistic oppression.

Whereas: We the undersigned realize that we should exercise the authority vested in us, and that we should proceed, in responsible discharge of the revolutionary duty, to nationalize all the American

dependent upon the creation of a fictitious fund consisting of "twenty-five per cent of the foreign exchange received by Cuba from its annual sales to the United States of Cuban sugar in excess of three million Spanish long tons at a price of not less than 5.75 cents per English pound (f.a.s.)." 307 F.2d at 862. Beyond this, First National City obviously was damaged by discrimination to the extent it did not enjoy the profitable use of its Cuban properties during the period non-American bank enterprises operated unmolested.

#### IV.

The totality of circumstances presented by this case—a patent failure to provide adequate compensation, a retaliatory confiscation by a foreign government, and discrimination against United States nationals—compel a finding that the Cuban decree directing confiscation of First National City's property was in direct contravention of the principles of international law. Thus First National City is entitled to set-off against the first claim for relief such

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banks operating in our country, thus advancing still further on the road undertaken by our people, with firm patriotic will, toward the total economic independence of our nation.

Now, therefore: Exercising the authority vested in us, in accordance with the provisions of Law No. 851 of July 6, 1960,

#### We Resolve:

First, To order the nationalization, by expropriation, and consequently, award to the Cuban Government, in absolute ownership, all the assets, rights and shares deriving from the utilization thereof, especially the banks, including all their branches and agencies located in Cuba, which are the property of the following legal persons:

1. The First National City Bank of New York
2. The First National Bank of Boston
3. The Chase Manhattan Bank

Second: Accordingly, the Cuban State is hereby declared subrogated in the place and stead of the natural or juristic persons listed in the preceding paragraph with respect to the above mentioned property, rights, and rights of action, and to the assets and liabilities forming the capital of the above mentioned companies."

\* \* \* \* \*

<sup>7</sup> Law No. 891, Def. Ex. 10.



amount as may be due and owing to it from the Cuban Government as compensation for the seized Cuban properties, and I so hold.<sup>8</sup>

Banco Nacional is quite correct in pointing out that the amount owing to First National City from the Government of Cuba under the applicable international law "principles of compensation"<sup>9</sup> cannot be determined on this record. The actual amount of the set-off which can be asserted here poses delicate questions of fact and law requiring further careful consideration. See *Reeves*, supra at 505-508, for a consideration of some of the factors involved. It therefore cannot be determined on these motions whether, as defendant contends, the amount of the set-off equals or exceeds the sum of \$1,810,880.51 admittedly owing to the plaintiff. If it does, defendant is entitled to judgment dismissing count one.<sup>10</sup>

## V.

The second claim for relief may be speedily disposed of. It alleges that a number of Cuban banks which were nationalized pursuant to Law No. 891 in October, 1960, at that time maintained accounts with the defendant at its office in New York City. Banco Nacional as agent of the Cuban Government now lays claim to these funds, amounting to some \$33,812.93, by virtue of the confiscation decree declaring

<sup>8</sup> The *Sabbatino* amendment is inapplicable "in any case with respect to which the President determines that application of the act of state doctrine is required in that particular case by the foreign policy interests of the United States, and a suggestion to this effect is filed on his behalf in that case with the court." 22 U.S.C. § 2370(e)(2). However, since the Executive Branch has maintained silence for the six years this action has been pending, it is clear that it has not determined that foreign policy interests of the United States require application of the act of state doctrine here.

<sup>9</sup> 22 U.S.C. § 2370(e).

<sup>10</sup> Any sum which First National City is permitted to set-off in this action will, of course, have to be taken into account by the United States Foreign Claims Settlement Commission in assessing claims filed by First National City. See International Claims Settlement Act, § 501, 78 Stat. 1110 (1964), 22 U.S.C. § 1643.

it to have full title to the property of the Cuban banks who maintained these accounts in New York.

The short answer to this claim is simply that "when property confiscated is within the United States at the time of the attempted confiscation, our courts will give effect to acts of state 'only if they are consistent with the policy and law of the United States.' " *Republic of Iraq v. First National City Bank*, 353 F.2d 47, 51 (2d Cir. 1965), cert. den., 382 U.S. 1027, 86 S. Ct. 648, 15 L. Ed. 2d 540 (1966), quoting ALI, Restatement of Foreign Relations Law § 46 (Proposed Official Draft, 1962). The Cuban decree, like the attempted confiscation of the accounts in *Republic of Iraq*, is plainly contrary to our policy and laws. It is not entitled to extraterritorial enforcement in United States courts as to property located within the United States. *Republic of Iraq v. First National City Bank*, supra; see *F. Palicio y Compania v. Brush*, 256 F. Supp. 481 (S.D. N.Y. 1966), aff'd per curiam, 375 F.2d 1011 (2d Cir. 1967); see Note, International Conflict of Laws: Limitations Imposed On Effect American Courts May Give Foreign Confiscations, 1966 Duke L.J. 828. Defendant is therefore entitled to judgment dismissing count two.

## VI.

In the light of what has been already said the motions before me are disposed of as follows:

(1) Defendant's motion for summary judgment on the second claim for relief is granted. Since I find there is no just reason for delay, it is directed that final judgment in favor of defendant will be entered accordingly. Rule 54(b), F.R.C.P.

(2) Plaintiff's cross-motion for summary judgment on its first claim and on the counterclaims is in all respects denied.

(3) Defendant's motion for summary judgment on the first claim is denied since there are triable issues of fact

and law with respect to the amount of defendant's set-off. However, I hold that defendant is entitled to set-off as against the first claim for relief any amounts due and owing to it from the Cuban Government by reason of the confiscation of First National City's Cuban properties.

This opinion shall constitute my specification of the facts supporting that holding pursuant to Rule 56(d), F.R.C.P. The case will be tried on the sole issue of the amount which defendant is entitled to assert by way of set-off.

It is so ordered.



Opinion, Dated July 16, 1970

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UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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Nos. 480 and 481—September Term, 1969.  
(Argued March 23, 1970                      Decided July 16, 1970.)  
Docket Nos. 32533 and 33864

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BANCO NACIONAL DE CUBA,

*Appellant*

*v.*

THE FIRST NATIONAL CITY BANK OF NEW YORK,

*Appellee*

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Before :

LUMBARD, *Chief Judge*,

HAYS, *Circuit Judge*, and BLUMENFELD, *District Judge*.\*

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Appeal from an order of the United States District Court for the Southern District of New York, Frederick vanP. Bryan, *J.*, granting defendant-appellee's motion for summary judgment on its counterclaim against plaintiff appellant. Reversed and remanded with directions.

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VICTOR RABINOWITZ, New York, N. Y. (Rabinowitz, Boudin & Standard, Leonard B. Boudin, and Kristin Booth Glen, on the brief) *for appellant*.

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\* Sitting by designation.

HENRY HARFIELD, New York, N. Y. (Shearman & Sterling, Wm. Harvey Reeves, and John J. Madden, Jr., on the brief, *for appellee*.

WALTER J. NEYLON, New York, N. Y., on the brief, *for Alicia Ruiz Martinez, Sr., et al., intervenors*.

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LUMBARD, *Chief Judge*:

Plaintiff-appellant Banco Nacional de Cuba appeals from an order of the District Court for the Southern District of New York which granted summary judgment to defendant-appellee First National City Bank of New York (First National City) on Banco Nacional's two causes of action. Appellant has abandoned the second cause of action on this appeal, and thus only the first cause of action, which is based on the following facts, is before us on this appeal. First National City, when the Castro government of Cuba expropriated its properties there, forthwith sold collateral securing a loan it had made to Banco Nacional prior to the change in Cuba's government. The effect of Judge Bryan's order was to allow First National City to retain, as an offset against the value of its expropriated properties, the amount by which the proceeds from the sale of the collateral exceeded the amount then owing on the loan. We hold that allowing such an offset was error. The so-called Hickenlooper Amendment does not give to a lender such as First National City the right to apply assets under its control to recoup losses it has suffered by expropriation of its properties in Cuba. Accordingly, we reverse and remand to the district court for a factual finding as to the amount of the excess. Once this factual determination is made, we direct entry of summary judgment in favor of Banco Nacional on its first cause of action.

On July 8, 1958, First National City made a fifteen million dollar secured loan to Banco de Desarrollo Economico y Social (Bandes), a corporate agency of the gov-

ernment of the Republic of Cuba. Collateral for the loan was pledged by Banco Nacional de Cuba (Banco Nacional) and another Cuban government agency, Fondo de Estabilizacion de la Moneda (Fondo); this security was held in New York and consisted of bonds of the United States government and obligations of the International Bank of Reconstruction and Development.

The Castro forces seized control of the government of Cuba on January 1, 1959. Thereafter, on July 8, 1959, First National City renewed the fifteen million dollar loan to Banderes for another year. During the course of the ensuing year, two Cuban laws went into effect which resulted in the dissolution of Banderes and the succession by Banco Nacional to many of its rights and obligations, including the obligation to repay the fifteen million dollars, plus interest, to First National City. The Republic of Cuba also guaranteed that the loan would be repaid.<sup>1</sup>

First National City and Banco Nacional renegotiated the loan for the second time on July 7, 1960. Banco Nacional repaid one-third of the loan—five million dollars—and First National City released approximately one-third of the collateral. At Banco Nacional's request, First National City agreed not to demand repayment of the ten million dollar balance for one year.

On September 16, 1960, the Cuban militia occupied the eleven First National City branch offices in Cuba. Executive Power Resolution No. 2, issued by the Castro government the following day, formally confirmed that the branches had in fact been nationalized.<sup>2</sup>

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<sup>1</sup> The district court cited these laws as Cuban Law No. 730, February 16, 1960, and Cuban Law No. 847, June 30, 1960.

<sup>2</sup> Executive Power Resolution No. 2 was issued pursuant to Cuban Law No. 851, July 6, 1960. See *Banco Nacional de Cuba v. Sabbatino*, 307 F.2d, 845, 849, 861-2 (2d Cir. 1962). Executive Power Resolution No. 2 is set out in the opinion of the district court, 270 F. Supp. at 1009-1010, note 6.

First National City retaliated almost immediately. On September 20, 1960, it notified Banco Nacional that it had closed Banco Nacional's accounts as of September 17 and that it was claiming the amounts on deposit therein as an offset against the nationalization of its properties in Cuba.<sup>3</sup> What is more important to the present appeal, on September 21 and 22, 1960, First National City sold the collateral held in New York as security on the ten million dollar loan. First National City received from that sale an amount—conceded to be at least \$11,892,448 and perhaps as much as \$12,412,000—which was substantially in excess of that required to discharge the ten million dollar principal sum and the interest thereon at the annual rate of 4 per cent for the period July 8, 1960 through the time of the sale.

## II.

Banco Nacional instituted suit in November, 1960, against First National City to recover the excess realized on the sale of the collateral held as security for the loan. Its complaint also set forth a second cause of action for recovery of the deposits on the Cuban banks which First National City had retained. As Judge Bryan described it, First National City's answer raised "a series of defenses, set-offs and counterclaims based principally on the confiscation of First National City's Cuban branches." 270 F. Supp. at 1005. Both parties moved for summary judgment on both causes of action and on the counterclaims.

As to the second cause of action, Judge Bryan granted First National City's motion for summary judgment. Banco Nacional filed a notice of appeal from that portion of his

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<sup>3</sup> What had happened was that a number of private Cuban banks with deposits in First National City were nationalized pursuant to Cuban Law No. 891 in October 1960, and the confiscation decree declared that Banco Nacional was to have full title to the property of those banks. Thus, First National City, in notifying Banco Nacional, referred to the accounts as Banco Nacional's.

order, but is not pressing that appeal at this time.<sup>4</sup> In dealing with the first cause of action, Judge Bryan denied Banco Nacional's motion for summary judgment on its claim and on First National City's counterclaim. However, as to defendant First National City's motion for summary judgment on the first cause of action and the counterclaim, Judge Bryan ruled:

Defendant's motion for summary judgment on the first claim is denied since there are triable issues of fact and law with respect to the amount of defendant's set-off. However, I hold that defendant is entitled to set-off as against [Banco Nacional's] first claim for relief any amounts due and owing to it from the Cuban Government by reason of the confiscation of First National City's Cuban properties.

270 F. Supp. at 1011.

It is this latter holding that is before us on this appeal. After Judge Bryan's order was filed, the parties entered into a stipulation providing that the value of First National City's property which had been confiscated in Cuba exceeds any amount which Banco Nacional could be awarded

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<sup>4</sup> We only observe that Judge Bryan's resolution of this issue was in compliance with the decision of this court in *Republic of Iraq v. First National City Bank*, 353 F.2d 47 (2d Cir. 1965), cert. den., 382 U.S. 1027 (1960). We also note that the holding that the Cuban expropriation decrees are not entitled to extraterritorial enforcement in United States courts as to property located within the United States is distinct from the question whether the act of state doctrine — absent the Hickenlooper Amendment — bars an American court from inquiry into the validity of expropriations of American property within the territory of the expropriated nation.

On this appeal, certain intervenors point out that they claim some of these deposits. The court below, in granting summary judgment to First National City on Banco Nacional's second cause of action, did not reach these claims, which we assume will be litigated below at some time.

on its first cause of action to recover from First National City the excess amount realized on the sale of the collateral.<sup>5</sup>

### III.

First National City claims that it is entitled to retain the excess amount realized on the foreclosure of the collateral as a set-off because the Cuban government confiscated its branch banks without providing adequate compensation, and that this act was a violation of international law. Judge Bryan properly observed that under the United States Supreme Court's decision in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964), "inquiry into the legality *vel non* of the expropriations here involved would be foreclosed by the act of state doctrine which forbids the courts of one country from sitting 'in judgment of the acts of the government of another, within its own territory.' " 270 F. Supp. at 1007. However, Judge Bryan then concluded that the *Sabbatino* decision had been legislatively overruled "for all practical purposes," by the Hickenlooper Amendment to the Foreign Assistance Act of 1964, 22 USC. § 2370(e)(2), as amended, 79 Stat. 658-59 (Sept. 6, 1965). He also noted that the Hickenlooper Amendment had been held constitutional in the Southern District of New York in the sequel to the *Sabbatino* litigation, *Banco Nacional de Cuba v. Farr*, 243 F. Supp. 957 (S.D.N.Y. 1965); we add that the district court decision in *Farr* was affirmed in a lengthy opinion by Judge Waterman, 383 F.2d 166 (2d Cir. 1967), and that Banco Nacional's petition for a writ of certiorari in that case was denied, 390 U.S. 1956 (1968).

Judge Bryan also held that the Hickenlooper Amendment directed him, regardless of the act of state doctrine, to determine "the merits in cases involving a confiscation after January 1, 1959, by an act of a foreign state 'in

<sup>5</sup> This stipulation was entered for purposes of this litigation, to avoid the necessity of a trial on the value of First National City's expropriated assets located in Cuba. See 270 F. Supp. at 1010-11.



violation of the principles of international law, including the principles of compensation.' " 270 F. Supp. at 1007. Proceeding to the merits, Judge Bryan held that the confiscation of First National City's branches did violate international law because adequate compensation was not provided and because the confiscation was a reprisal evidencing discrimination against nationals of the United States. 270 F. Supp. at 1007-1010. In light of this, he concluded that First National City was entitled to a set-off against Banco Nacional's claim to recover the amount left from the sale of the collateral after deduction of the principal and interest due and owing.

On this appeal, Banco Nacional makes three principal arguments. First, it claims that the act by which the Cuban government confiscated First National City's branches in Cuba was an act of state, that the Hickenlooper amendment is not applicable to the facts in this case, and thus that the district court should have followed Mr. Justice Harlan's opinion for the Court in *Sabbatino* and not inquired into the validity of the Cuban expropriation under international law.<sup>6</sup> Second, Banco Nacional argues that the Hickenlooper Amendment is unconstitutional.<sup>7</sup> Third, Banco Nacional contends, with some justification, that summary judgment on First National City's counterclaim was improper because: (1) the counterclaim was invalid procedurally in that it was directed at the Republic of Cuba, which is not an "opposing party" in the present suit under Rule 13 of the Federal Rules of Civil Procedure and the interpretations of that rule; or (2), assuming the counterclaim to be proper

<sup>6</sup> A sub-part of this argument is that, assuming the Hickenlooper Amendment applies to the facts of this case, Judge Bryan incorrectly applied international law in holding that the Cuban expropriations violated international law. However, appellant concedes that if this court holds the Amendment applicable to the case at bar, Judge Bryan's decision on this issue was in accordance with the decision of this court in *Banco Nacional v. Farr*, *supra*. 382 F.2d at 183-185; appellant states that it raises the issue only to preserve it for further appeal.

<sup>7</sup> Again, this issue was resolved against Banco Nacional in *Banco Nacional v. Farr*, *supra*, 383 F.2d at 178-183.

procedurally, Banco Nacional is not in fact liable for the obligations of the Republic of Cuba; or (3) because at the very least this latter question raised a triable issue of fact which was improperly resolved on a motion for summary judgment. Since we agree with Banco Nacional's first argument, we find it unnecessary to pass on the other contentions.

#### IV.

*Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964)<sup>8</sup> laid down a rule of federal law by which this court and all other courts are bound absent subsequent changes in the rule wrought by Congress or by the Supreme Court. In the course of his exhaustive opinion for the eight-member majority of the Court, Mr. Justice Harlan devoted considerable attention to the general problem of when domestic courts should decline to pass upon claims which draw into question the validity of the acts of foreign sovereign states. He observed that the

"continuing vitality [of the act of state doctrine] depends on its capacity to reflect the proper distribution of functions between the judicial and political branches of the Government on matters bearing upon foreign affairs. It should be apparent that the greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it, since the courts can then focus on the application of an agreed principle to circumstances of fact rather than on the sensitive task of establishing a principle not inconsistent with the national interest or with international justice. It is also evident that some aspects of international law touch much more sharply on national nerves than do others; the less important the implications of an issue are for our foreign policy,

<sup>8</sup> Reversing *Banco Nacional de Cuba v. Sabbatino*, 307 F.2d 845 (2d Cir. 1962).



the weaker the justification for exclusivity in the political branches.”

376 U.S. at 427-8.

From this general discussion, Mr. Justice Harlan's opinion proceeds to a specific consideration of the problem posed when the courts of one nation purport to examine the validity under international law of another nation's expropriation of the property of foreign nationals. Examining the state of the international law on this question, the Court concluded that there was no extant definition of the limits of such power which could command anything approaching a substantial majority of informed opinion. *Id.* at 428. After canvassing some of the basic disagreements on the question,<sup>9</sup> the Court stated that “[i]t is difficult to imagine the courts of this country embarking on an adjudication in an area which touches more sensitively the practical and ideological goals of the various members of the community of nations.” *Id.* at 430.

The Court's opinion also stressed that it is far wiser for the courts to defer to the Executive in the task of securing some form of compensation for citizens of the United States who have lost property through expropriation by a foreign state. The Executive can often achieve some form of general redress, whereas judicial determinations can have only an occasional impact.<sup>10</sup> Moreover, judicial

“decisions would, if the acts involved were declared invalid, often be likely to give offense to the expropriating country; since the concept of territorial sovereignty is so deep-seated, any state may resent the refusal of the courts of another sovereign to accord validity to acts within its territorial borders. Piece-meal dispositions of this sort involving the probability of affront to another state could seriously interfere

<sup>9</sup> 376 U.S. at 429-430.

<sup>10</sup> See section VI, *infra*.

with negotiations being carried on by the Executive Branch and might render less favorable the terms of an agreement that could otherwise be reached. Relations with third countries which have engaged in similar expropriations would not be immune from effect."

*Id.* at 431-2. Mr. Justice Harlan also dismissed the argument that American courts should examine the validity of foreign expropriations because in doing so they would make an important contribution to the development of international law as based on "the sanguine proposition that the decisions of the courts of the world's major capital exporting country and principal exponent of the free enterprise system would be accepted as disinterested expressions of sound legal principle by those adhering to widely different ideologies." 376 U.S. at 434-5.

Accordingly, the Court held "that the Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign government, extant and recognized by this country at the time of suit, in the absence of a treaty or other unambiguous agreement regarding controlling legal principles, even if the complaint alleges that the taking violates customary international law." *Id.* at 428. There can be no doubt that the confiscation of First National City's branch offices in Cuba by the Cuban government was such a taking of property. As such it is an act of state the validity of which the Court has directed the Judicial Branch not to examine.

## V.

The analysis just presented would suffice to decide this appeal but for the enactment of the Hickenlooper Amendment by Congress. The amendment, sometimes described during the Congressional debates as the "Sabbatino Amend-

ment,"<sup>11</sup> was passed in 1964, shortly after the Supreme Court rendered its decision in *Sabbatino*, and that fact is important in interpreting the language Congress used. In pertinent part, the Hickenlooper Amendment now provides:

"(2) Notwithstanding any other provision of law, no court in the United States shall decline on the ground of the federal act of state doctrine to make a determination on the merits giving effect to the principles of international law in a case in which a claim of title or other right to property is asserted by any party including a foreign state (or a party claiming through such state) based upon (or traced through) a confiscation or other taking after January 1, 1959, by an act of that state in violation of the principles of international law, including the principles of compensation and the other standards set out in this subsection. . . ."

Judge Bryan held that the Hickenlooper Amendment overruled the *Sabbatino* decision "for all practical purposes" and that he was therefore required to disregard the act of state doctrine and to pass on the validity of the expropriations of First National City's branches in terms of international law. Banco Nacional takes the position that Judge Bryan's reading of the Hickenlooper Amendment is far too broad. We agree.

To understand the legislative history upon which Banco Nacional relies, it is necessary to sketch briefly the facts of *Sabbatino* itself. The case involved a shipment of Cuban sugar which was to have been purchased by an American commodity broker, Farr, Whitlock & Co., from the Cuban subsidiary of an American owned firm, C.A.V. Before the shipment could leave Cuba, all of the C.A.V.'s assets in Cuba were expropriated. Thereafter, the Cuban govern-

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<sup>11</sup> See e.g., Hearings before the Senate Committee on Foreign Relations on S. 2659, S. 2660, S. 2662, and H.R. 11380, 88th Cong., 2d Sess. (1964) at 449; Hearings before the House Committee on Foreign Affairs on H.R. 7750, 89th Cong., 1st Sess. (1965).

ment allowed the shipment of sugar to leave Cuba, but only after Farr, Whitlock had entered into contracts, identical to its earlier agreement with C.A.V., with Banco Para Comercio Exterior de Cuba (Banco Exterior), an instrumentality of the Cuban government. The ship carrying the sugar was then allowed to sail from Cuba to Morocco. Banco Exterior assigned the bills of lading to Banco Nacional, which in turn assigned them to Societe Generale, a French bank which acted as Banco Nacional's agent in New York, for presentation to Farr, Whitlock for payment. In some manner, Farr, Whitlock obtained possession of the bills of lading from Societe Generale without making payment upon presentation. The money which Farr, Whitlock was supposed to pay for the shipment was also claimed by C.A.V. Thus, the dispute over the right to the proceeds of the sale of the expropriated shipment of Cuban sugar was between Banco Nacional, which in the words of the Hickenlooper Amendment claimed "title or other right . . . based upon (or traced through) a confiscation," and C.A.V., an American-owned firm which had owned the sugar before the expropriation.

*Sabbatino* was handed down by the Supreme Court in March, 1964, and in April, 1964, Senator Hickenlooper proposed the initial version of a foreign aid bill amendment related to the case in the Foreign Relations Committee.<sup>12</sup> A Conference Committee rewrote the language in September, 1964, and the amended version was enacted on October 7, 1964, as section 301(c)(4) of the Foreign Assistance Act of 1964. Pub. L. 88-633, 78 Stat. 1009, 1013. It was changed slightly and re-enacted in its present form on Sep-

<sup>12</sup> "No court in the United States shall decline on the ground of the federal act of state doctrine to make a determination on the merits, or to apply principles of international law including the principles of compensation and the other standards set out in this subsection, in a case in which an *act* of a foreign state occurring after January 1, 1959 is alleged to be contrary to international law, and effect shall not be given by the court in any such case to *acts* that are found to be in violation thereof." (S. Rep. No. 1188, Part I, 88th Cong., 2d Sess. [1964], p. 37; emphasis added.)

tember 6, 1965, as section 301(d)(2) of the Foreign Assistance Act of 1965. Pub. L. 89-171, 79 Stat. 653 22 U.S.C. § 2370(e)(2).<sup>13</sup>

It is evident from the proceedings in Congress relating to the Hickenlooper Amendment that Congressmen and others were quite concerned about the problem peculiarly related to the facts of the *Sabbatino* case. At the time of the Congressional debates during 1964 and 1965, virtually all American-owned property in Cuba had been nationalized. Much of this property consisted of productive installations such as sugar plantations, fertilizer plants, mines, and oil production facilities. In light of this, when the Supreme Court in *Sabbatino* issued a ruling which would apparently permit Banco Nacional to prevail over an American-owned firm in securing the proceeds of the sale of a shipment of expropriated sugar to an American commodity broker, the phrase "thieve's market for expropriated property" came into vogue. In explaining his proposal in an August, 1964, letter to the Washington Post, Senator Hickenlooper used the term "thieve's market," and explained further that the Amendment's purpose was to require American courts to apply international law "whenever expropriated property comes within the territorial jurisdiction of the United States." 110 Cong. Rec. 19548. At another time, he said "Basically the amendment is designed to assure that the private litigant is granted his day in court." 110 Cong. Rec. 18936. The Senator further explained:

"[The amendment] will discourage foreign expropriation by making sure that the United States cannot become a 'thieve's market' for the product of foreign expropriations.

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One of the principal reasons for the proposed amendment is that it will serve notice that foreign

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<sup>13</sup> For a discussion of these changes see *Banco Nacional v. Farr*, *supra*, 383 F.2d at 171-2, and at 171, note 5.

states taking action against U.S. investment in violation of international law cannot market the product of their expropriation in the United States free from litigation."

110 Cong. Rec. 19555, 19559 (1964). See also *id.* 19548, 19557.

When the Conference Committee reported the Amendment to the House of Representatives on October 2, 1964, Congressman Adair, its sponsor in the House, gave this explanation of its purpose:

"It insures that however the case may arise or the act of state doctrine be invoked, a party who had suffered an expropriation in violation [of international law] *may bring suit to assert his claim to the expropriated property if there is an attempt to market it in the United States* or can resist a suit by the expropriating government to seize the property."

110 Cong. Rec. 23680 (1964) (emphasis added). Senator Hickenlooper described the provision in virtually identical terms in the Senate the following day. See 110 Cong. Rec. 24076-7 (1964).

The Hickenlooper amendment was further considered in the 89th Congress during 1965, particularly in hearings held by the House Committee on Foreign Affairs on its reenactment. The first witness at these hearings was Professor Cecil Olmstead, one of the original authors of the Hickenlooper Amendment, who represented the Rule of Law Committee—formed by a group of American companies which had suffered expropriations—in its support for the Amendment. He first discussed *Sabbatino*, describing its effect as follows:

"... [I]f the former American owners of property expropriated abroad seek to recover that property when it turns up within the United States they are denied any kind of recourse to U.S. courts, both State and Federal, even in cases in which the expropriation is

uncompensated. . . . Specifically, this means that the fruits of such illegal expropriation could be marketed with impunity in the United States."

Hearings before the House Committee on Foreign Affairs on H.R. 7750, 89th Cong., 1st Sess. (1965), 578. See also *Id.* 579, 591, 592, 598-599, 601, 604-605, 612-615.

During Professor Olmstead's testimony, an instructive colloquy took place between Olmstead and Congressman Fraser, a member of the Committee. Mr. Fraser was interested in determining how broad the Amendment was. He asked:

"For example, supposing that country X expropriates some property and doesn't compensate for it and then a property belonging to the foreign state comes into the hands of an American citizen within this country so that they bring an action, they attach the property and bring an action in the U.S. courts alleging that this government has wronged them by expropriating their property, but the property they have attached is not the property that was expropriated, nevertheless they make the claim they are entitled to compensation and the defense, I assume, by the country involved is that they had a right to expropriate.

Does that situation come within the language of your amendment?

Mr. Olmstead: No, sir; that would not come within it. Our amendment has no provision in its scope to apply to property other than that actually expropriated by the foreign country itself."

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Mr. Fraser: You are saying it would be limited solely to situations where you actually—where what [was] at issue was the title of the [expropriated] property, that is the major issue?

Mr. Olmstead: Yes."



There followed a page of discussion about ore or oil from an expropriated mine or well coming back into this country, and Professor Olmstead then concluded: "Of course this amendment will only operate when *some proceeds of the illegal expropriation turn up in the United States*," *id.* at 607-608 (emphasis added).

Attorney General Katzenbach, who testified before the same Committee the day after Professor Olmstead, took the same view. In his opening remarks in opposition to the Amendment he stated:

"What are we taking about in this amendment? We are talking about a very isolated, infrequent occurrence which is when American property that has been nationalized in some way or another finds its way back in the United States. That is very unlikely to occur. . . . It is generally an accident because the owner of that property, or the foreign government involved, is not going to bring that property into this country and is deterred from doing it by the fact that normally, if that property is brought into this country, the assets from it are going to be frozen in an outstanding dispute with the foreign country."

House hearings, *supra*, at 1235. See also, *id.* 1236, 1237 (testimony of Mr. Katzenbach).

Congressman Gross, another member of the House Foreign Affairs Committee, urged that the Amendment be broadened to enable the owner of expropriated property to seize Cuban property in the United States as an offset for the value of property seized by Cuba. See House Hearings, *supra*, at 1249; see also *id.*, at 1050. As appellant Banco Nacional points out, this is precisely the position First National City takes in this litigation. However, First National City has cited no legislative history, and we have found none, which indicates that Mr. Gross' suggestion was thought to have been adopted by Congress when it re-enacted the Hickenlooper Amendment.



Banco Nacional quotes the following colloquy between Mr. Katzenbach and Representative Gallagher of the House Foreign Affairs Committee as indicative of the legislators' and witnesses' understanding of the scope of the Amendment:

"Mr. Gallagher: This amendment merely applied to property that works its way back into the United States; correct?

Attorney General Katzenbach: Yes.

Mr. Gallagher: That it has no effect whatsoever on any property that continues to rest or vest in the country that made the seizure?

Attorney General Katzenbach: That is correct."

House hearings, *supra*, at 1247. See also colloquy between Mr. Katzenbach and members of the Committee, *id.* at 1245-1247; colloquy between Professor Henkin and Mr. Gallagher, *id.* at 1072; testimony of Professor Metzger, *id.* at 1025-1031; testimony of Professor McDougal, *id.* at 1043, 1050-1051; statement of the Committee on International Law of the Association of the Bar of the City of New York submitted to the House Foreign Affairs Committee in support of the Amendment, *id.* at 1316. See also Hearings before the Senate Committee on Foreign Relations on the Foreign Assistance Program, 89th Cong., 1st Sess. (1965), 728 (letter to Chairman Fulbright from George W. Ball); 730-760 (an appendix consisting of material submitted by Senator Hickenlooper, much of it from the earlier House hearings).

Given all of this background, we can find no basis for holding that the present case is one "in which a claim of title or other right to property is asserted by [First National City] . . . based upon (or traced through) a confiscation or other taking. . . ." 22 U.S.C. § 2370(e)(2). To do so would stand the statute on end. If one fact is clear from the legislative history, it is that this language was designed to be invoked by American firms in order to afford

them "a day in court"—and presumably a monetary recovery—when some other entity attempted to market the American firms' expropriated property and some aspect of such an attempted transaction took place in this country. We cannot believe that through the same language Congress intended to create a self-help seizure remedy for those few American firms fortunate enough to hold or have access to some assets of a foreign state at the time that state nationalizes American property.<sup>14</sup>

## VI.

Indeed, it seems to us that such an interpretation of the Hickenlooper Amendment would run counter to another important Congressional policy.

Through the provisions of Subchapter V of the International Claims Settlement Act of 1949, Pub. L. 88-666, 78 Stat. 1110, amended Oct. 19, 1965, Pub. L. 89-262, § 1, 79 Stat. 988; Nov. 6, 1966, Pub. L. 89-780, § 1, 80 Stat. 1365, 22 U.S.C. §§ 1643-1643k (1970 Supp.), on October 16, 1964, Congress provided for "the determination of the amount and validity of claims against the Government of Cuba . . . [arising] out of nationalization, expropriation, intervention, or other takings of . . . property of nationals of the United States . . . ." 22 U.S.C. § 1643 (1970 Supp.). Obviously, the expropriation of First National City's branches in Cuba gave rise to a claim of the sort which Congress intended to be submitted to the Foreign Claims Settlement Commission. See 22 U.S.C. § 1643b(a) (1970 Supp.).

On the other hand, Congress and the Executive Branch have also acted, pursuant to the Trading with the Enemy Act, 50 U.S.C. App. § 5 (1970 Supp.); Proc. 3447, 27 F.R. 1085, 3 C.F.R., 1959-1963 Comp., to block all Cuban assets present in this country as of July 8, 1963. See 31 C.F.R.

<sup>14</sup> See Henkin, Act of State Today: Recollections in Tranquility, 6 Col. J. of Transnational Law, 175, 184-5 (1967); see also *id.* 185, n. 40.

§§ 515, et seq. (1970).<sup>15</sup> At present there is no provision in the federal statutes or regulations providing for vesting of the blocked Cuban assets—whether assets of the Cuban government or of Cuban nationals—in the government of the United States for sale and use by the Foreign Claims Settlement Commission to pay those who have submitted claims to the Commission based on expropriations by the Cuban government.<sup>16</sup>

It is this system of claim submission and blocking of assets which First National City seeks to circumvent. Due to the Cuban expropriation of its branches, First National City felt justified in breaching whatever loan agreement it had entered with Banco Nacional on July 7, 1960, by prematurely foreclosing on the collateral held as security. It was fortunate for First National City that sale of the collateral brought more than enough money to cover the principal amount and interest then due on the loan. First

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<sup>15</sup> The report of the Treasury Department, Office of Foreign Assets Control, on the census of blocked Cuban assets, is reprinted in House Hearings, *supra*, at 1264. The report states, as reprinted at 1264, that the Cuban assets control regulations were adopted "under section 5(b) of the Trading with the Enemy Act of 1917, as amended, to implement the policy of an economic embargo of Cuba set forth in Proclamation No. 3447, which was issued by the President under section 620(a) of the Foreign Assistance Act of 1961, Public Law 87-195."

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<sup>16</sup> In 1964, when Congress enacted subchapter V of the International Claims Settlement Act of 1949, relating to claims against Cuba, it included as section 511(b) a provision vesting the blocked assets of the Cuban government in the United States government and further providing that the proceeds of such assets of the Cuban government should be used to reimburse the United States government for the expense of operating the Foreign Claims Settlement Commissions and the Department of the Treasury in processing claims against Cuba. Pub. L. 88-666, section 511(b), 78 Stat. 1113 (October 16, 1964). However, that section was repealed one year later, see Pub. L. 89-262, section 5, 79 Stat. 1988 (October 16, 1965). The report of the Senate Foreign Relations Committee states that "the committee was persuaded by the following argument advanced by the Department of State:

"it is the Department's view that vesting and sale of Cuban property could set an unfortunate example for countries less dedicated than the United States to the preservation of rights. The

National City was also fortunate in that they sold the security before Cuban assets were blocked in July, 1963. Had they waited, it seems clear, under 31 C.F.R. § 515.202 (1970), that any sale of the collateral put up by Banco Nacional as security on the loan in suit would have been impossible without a license from the Office of Foreign Assets Control of the Treasury Department. See 31 C.F.R. § 515.801 (1970). As matters now stand First National City has recouped dollar-for-dollar on the loan transaction; be its position on this appeal, it seeks something more.

We do not believe that First National City has any special claim to the excess proceeds of the sale of the collateral. Any judgment rendered in favor of Banco Nacional on its first cause of action would, after deduction of attorney's fees, become a blocked Cuban asset.<sup>17</sup> Presumably, if other attempts at settlement of the claims fail, the blocked

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Government of the United States, as a matter of policy, encourages the investment of American capital overseas and endeavors to protect such investments against nationalizations, expropriations, intervention, and taking. To vest and sell Cuban assets would place the Government of the United States in the position of doing what Castro has done. It could cause other governments to question the sincerity of the United States Government in insisting upon respect for property rights. The result could be a reduction, in an immeasurable but real degree, of one of the protections enjoyed by American-owned property around the world.' "

Sen. R. No. 701, 89th Cong., 1st Sess., 2 U.S.C. Code Cong. & Admin. News p. 3583 (1965).

It seems to us that Congress' acceptance of the State Department's argument points up to some extent the wisdom of Mr. Justice Harlan's observation in *Sabbatino* that to permit American courts to pass on the validity of expropriations would have an effect on "[r]elations with third countries which have engaged in similar expropriations." 376 U.S. at 432.

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<sup>17</sup> See Report of Treasury Department, Office of Foreign Assets Control, *Census of Blocked Cuban Assets*, *supra* note 15, reprinted in House Hearings, *supra*, at 1264.

First National City's judgment debt to Banco Nacional for the excess amount it holds would have to be reported to the Office of Foreign Assets Control on Form TFR-607 under any one of several classifications of "reportable property" specified on that form.

Cuban assets will eventually be vested in the United States government and the Foreign Claims Settlement Commission will begin compensation of the claimants. As part of the pool of assets available for compensation, such a judgment in favor of Banco Nacional would serve to provide at least partial compensation of all those claimants who suffered losses in the Cuban expropriations. See testimony of Attorney General Katzenbach, House Hearings, *supra* at 1235-1236. No authority which First National City has cited in its brief establishes any right to a preference such as that which would result if the decision of the district court were to be affirmed. While Judge Bryan noted in a footnote that "[a]ny sum which First National City is permitted to set-off in this action will of course have to be taken into account by the United States Foreign Claims Settlement Commission in assessing claims filed by First National City," 270 F. Supp. at 1011, note 10, we observe that such a set-off against its total claims with the Commission would still allow First National City a dollar-for-dollar recoupment on a significant portion of its total claim for the value of its expropriated property—something which few, if any, other claimants are likely to receive.<sup>18</sup>

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The report also states that the deadline for filing reports for the Office's census of blocked Cuban assets was March 15, 1964. However, the report notes that there are probably many people holding blocked assets who did not know of the deadline, and states "extensions of time for filing were granted when necessary." There is little question that an extension would be granted in a situation such as the present case, where lengthy, litigation to settle the dispute over entitlement to the excess funds carried the parties past the filing deadline.

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<sup>18</sup> We note from the affidavit of First National City Bank submitted below that its claims for expropriated property is relatively small, about three million dollars, as compared to some claims which must have been filed by American corporations with large industrial operations in Cuba.

The windfall First National City seeks can best be understood through a hypothetical example. Assume that there are twenty claimants who have filed with the Foreign Claims Settlement Commission pursuant to 22 U.S.C. § 1643 (Supp. 1970). Ten claimants, called "A" claimants, each have claims for fifteen million dollars; four claimants, called "B" claimants each claim five million dollars. The

## VII.

Since there is a factual dispute, to the extent of more than \$500,000, between the parties as to the total amount realized from the sale of the collateral and as to the amount of interest properly deducted, which Judge Bryan was not called upon to resolve due to his disposition of the summary judgment motions, we remand to the district court for a determination of the exact amount of excess left after the principal sum and the interest due thereon is deducted from the proceeds of the sale of the security. When this determination is made, the district court is directed to grant Banco Nacional's motion for summary judgment on its first cause of action.

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twentieth claimant is First National City Bank which, for purposes of this example, also seeks five million dollars. Further, assume that absent the sum in dispute in this case the total value of blocked Cuban assets held by the Office of Foreign Assets Controls is 20 million dollars.

If the claims are eventually allowed to vest against the fund and some sort of pro rata payment authorized, First National City Bank will do considerably better if it is permitted to retain the Cuban assets which fortuitously were in its reach, rather than if it had merely held the excess here in dispute so that in time it would have been blocked and become part of the fund.

Assume First National City has seized the collateral, sold it, and realized three million dollars over the amount owed with interest. If, as it seeks in this suit, it keeps the three million as a set-off against its claims against Cuba, the fund compromised of all blocked assets would still equal twenty million dollars. However, the claims against the fund would be reduced from 200 million to 197 million, since First National City would have to off-set the three million dollars against the five million dollars we have assumed it has claimed with the Foreign Claims Settlement Commission. See 22 U.S.C. § 1643 (Supp. 1970). On this basis, the pro rata share would be 10.9 cents on the dollar. The "A" claimants, seeking 15 million each, would each receive about 1.52 million; the "B" claimants, with claims for 5 million, would each take about .57 million. And First National City, with its claim reduced to 2 million, would receive about .24 million. But to this must be added the 3 million which it took directly, bringing its total recovery to 3.24 million.

In the second case, First National has not (or is not allowed to) take the 3 million for its own account; rather, it stays in Banco Nacional's name and in time becomes part of the fund. Now, the fund

Reversed and remanded for further proceedings consistent with this opinion.

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has 23 million, while the claims are 200 million, since First National City has nothing to off-set against its initial claim of 5 million. Here, the pro rata share would be about 11.5 cents on the dollar. The "A" claimants would receive about 1.73 million each, while the "B" claimants—including First National City—would take about .575 million each.

As can be seen, by resorting to self-help and avoiding the Congressional scheme for orderly settlement of these claims, First National City stands to profit considerably. Under our hypothetical figures, the difference is between 3.24 million and .575 million dollars. The windfall of course is not at the expense of Cuba, but rather comes out of the shares of all other American nationals who have lost property by the Cuban expropriation.



Order, Dated and Entered January 25, 1971

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 846

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FIRST NATIONAL CITY BANK,

*Petitioner,*

*v.*

BANCO NACIONAL DE CUBA,

*Respondent.*

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**ORDER**

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The petition for a writ of certiorari is granted. The judgment of the Court of Appeals is vacated and the case is remanded to the Court of Appeals for reconsideration in light of the views of the Department of State expressed in its letter dated November 17, 1970, and transmitted to this Court by the Solicitor General. In taking this action, the Court is expressing no views on the merits of the case.



**Opinion, Dated April 27, 1971**

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**UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT**

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Nos. 798, 799—September Term, 1970.

(Argued March 18, 1971                      Decided April 27, 1971.)  
Docket Nos. 32533, 33864

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BANCO NACIONAL DE CUBA,  
*Plaintiff-Appellant,*

v.

THE FIRST NATIONAL CITY BANK OF NEW YORK,  
*Defendant-Appellee.*

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**Before :**

LUMBARD, *Chief Judge,*  
HAYS, *Circuit Judge,* and BLUMENFELD, *District Judge.\**

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Appeal from an order of the District Court for the Southern District of New York, Frederick vanP. Bryan, J., holding the act of state doctrine inapplicable and granting defendant's motion for summary judgment on its counterclaim against plaintiff. After our reversal and remand to the District Court, the Supreme Court remanded this case to us for reconsideration in light of the views of the Department of State.

We adhere to our prior decision and reverse and remand with directions.

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VICTOR RABINOWITZ, New York, N.Y. (Rabinowitz, Boudin & Standard on the brief), *for appellant.*

HENRY HARFIELD, New York, N.Y. (Shearman & Sterling, Herman E. Compter and James B. Keenan, on the brief), *for appellee.*

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\* Sitting by designation.

LUMBARD, *Chief Judge*:

This case comes to us on remand from the Supreme Court for our reconsideration in light of the views of the Department of State expressed subsequent to our original decision which was filed on July 16, 1970. *Banco Nacional de Cuba v. The First National City Bank of New York*, 431 F.2d 394 (2d Cir. 1970). For the reasons stated below, we adhere to our prior decision and reverse and remand to the district court.

In the original action, Banco Nacional de Cuba brought suit against First National City Bank of New York in the Southern District. After the Castro government of Cuba had expropriated First National City's properties there pursuant to Cuban Law No. 851, First National City had sold collateral securing a ten-million-dollar loan it had made to Banco Nacional prior to the change in Cuba's government. From the sale of that collateral, First National City had received an amount—conceded to be at least \$11,892,448 and perhaps as much as \$12,412,000—which was substantially in excess of that required to discharge the ten-million-dollar principal sum and the four per cent interest thereon. Banco Nacional's suit was to recover the excess realized on that sale.

In the district court, First National City raised a series of counterclaims and setoffs based principally on the contention, that, since the Cuban government had confiscated its properties in Cuba in violation of international law, it was entitled to retain the excess on the sale of the collateral as an offset against the value of its confiscated properties. Judge Bryan in the Southern District granted summary judgment to First National City. *Banco Nacional de Cuba v. The First National City Bank of New York*, 270 F. Supp. 1004 (S.D.N.Y. 1967).

On appeal, we reversed the district court's judgment, holding that Cuba's confiscation of First National City's properties in Cuba was an act of state and that under *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964), the act of state doctrine foreclosed judicial inquiry into the

validity of that confiscation under international law. We held further that the Hickenlooper Amendment to the Foreign Assistance Act of 1964<sup>1</sup> did not apply here so as to defeat the act of state doctrine and thereby to give a lender such as First National City the right to apply assets under its control to recoup losses it has suffered by expropriation of its properties in Cuba. Accordingly, we concluded that allowing First National City its claimed offset against the allegedly unlawful expropriation was error; and we remanded to the district court for a factual finding as to the amount by which the proceeds of the sale of the collateral exceeded the amount then owing on the loan—which excess we directed should then be paid to Banco Nacional.

First National City petitioned for a writ of certiorari on October 13, 1970; and on November 17, 1970, the Legal Advisor to the Department of State wrote a letter to the Supreme Court expressing the views of that Department with respect to this case. The State Department's letter is set out in full in an appendix to this opinion. By order dated January 25, 1971, the Supreme Court granted certiorari and remanded the case to us without taking any position on the merits. The Supreme Court's order stated in full:

“846 First National City Bank v. Banco Nacional de Cuba. The petition for a writ of certiorari is granted. The judgment of the Court of Appeals is vacated and the case is remanded to the Court of Appeals for reconsideration in light of the views of the Department of State expressed in its letter dated November 17, 1970, and transmitted to this Court by the Solicitor General. In taking this action, the Court is expressing no views on the merits of the case.” 39 U.S.L.W. 3321 (January 26, 1971).

Upon reconsideration, we see no reason to change our initial decision on this appeal.

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<sup>1</sup> 22 U.S.C. § 2370(e)(2), as amended, 79 Stat. 658-59 (Sept. 6 1965).

Basically, the State Department's letter of November 17 expresses the view that the act of state doctrine does not bar consideration of a claim for compensation asserted as a defensive counterclaim or offset limited to the amount of a claim made in a United States court by a foreign government, arising out of a relationship between the parties when the act of state occurred, and where the foreign policy interests of the United States do not require application of the doctrine. It suggests that this Court is relieved from any restraint upon the exercise of its jurisdiction to adjudicate First National City's counterclaim arising out of the confiscation of its Cuban assets. The letter states that in this case

"the foreign policy interests of the United States do not require the application of the act of state doctrine to bar adjudication of the validity of a defendant's counterclaim or set-off against the Government of Cuba in these circumstances.

The Department of State believes that the act of state doctrine should not be applied to bar consideration of a defendant's counterclaim or set-off against the Government of Cuba in this or like cases."

First National City argues that this letter constitutes the requisite statement by the Executive Branch which under our decision in *Bernstein v. N.V. Nederlandsche Amerikaansche, etc.*, 210 F.2d 375 (2d Cir. 1954), relieves the courts from applying the act of state doctrine to bar examination of the validity of the law in question. Because the interpretation of *Bernstein* will be crucial to our determination of the instant case, we set forth the background of *Bernstein* in some detail.

That case involved the alleged confiscation of the property of a single plaintiff, a Jewish German national, by the Nazi German government between 1937 and 1939. Plaintiff alleged that he was compelled by officials of that government, acting through threats of bodily harm, indefinite imprisonment, and death for plaintiff and his family, to assign his property to the German government. Beginning

in 1946 the plaintiff sought to attach and recover some of the proceeds of his former property in a suit brought in a state court in New York and removed to the federal district court. In the first *Bernstein* case, *Bernstein v. Van Heyghen Freres Societe Anonyme*, 163 F.2d 246 (2d Cir.), cert. denied, 332 U.S. 772 (1947), we held, in an opinion by Judge Learned Hand, that the act of state doctrine prevented us from inquiring into the validity of the confiscation of the plaintiff's property by the Nazi government; and we therefore affirmed the district court's dismissal of the complaint. However, in the course of his opinion, Judge Hand said that it was a relevant question "whether since the cessation of hostilities with Germany our own Executive, which is the authority to which we must look for the final word in such matters, has declared that the commonly accepted doctrine which we have just mentioned does not apply." 163 F.2d at 249. After full consideration, we concluded that the Executive Branch had not in fact acted to relieve the courts of the restraint imposed by the act of state doctrine.

In the second *Bernstein* case, the same plaintiff brought a conversion action against another defendant — a Dutch corporation which, in participation in a plan with officials of the Nazi government, had confiscated and converted his stock in a German liability corporation. In that case, we reaffirmed our holding in the first *Bernstein* case that, because of the lack of a definitive expression of Executive policy, the act of state doctrine prevented judicial examination of official acts of the Nazi government. *Bernstein v. N.V. Nederlandsche-Amerikaansche, etc.*, 173 F.2d 71 (2d Cir. 1949). We did remand the case for the purpose of allowing the plaintiff to allege, if he could, that his property had been seized by persons acting in a private capacity; but we ordered him to refrain from alleging matters which would cause the court to pass on the validity of acts of officials of the German government.

Following that decision, the State Department issued a press release quoting a letter from its Acting Legal Advisor. As the release stated, that letter

"repeats this Government's opposition to forcible acts of dispossession of a discriminatory and confiscatory nature practiced by the Germans on the countries or peoples subject to their controls; states that it is this Government's policy to undo the forced transfers and restitute identifiable property to the victims of Nazi persecution wrongfully deprived of such property; and sets forth that the policy of the Executive, with respect to claims asserted in the United States for restitution of such property, is to relieve American courts from any restraint upon the exercise of their jurisdiction to pass upon the validity of the acts of Nazi officials."

When the case came before us again, we stated that "[i]n view of this supervening expression of Executive Policy, we amend our mandate in this case by striking out all restraints based on the inability of the court to pass on acts of officials in Germany during the period in question." 210 F.2d 375, 376 (2d Cir. 1954).

First National City argues that *Bernstein* requires that we change our prior decision in the instant case, as we did there, to conform with the State Department suggestions. It contends that since the Executive has now written a "Bernstein letter" exercising its prerogative in the area of foreign policy and suggesting that the act of state doctrine is inappropriate in this case, the policies underlying that doctrine, to which the Supreme Court gave crucial weight in *Sabbatino*, are not present here. According to First National City, judicial resolution of the issue raised by this claim would involve no encroachment on the Executive's prerogatives in the area of foreign affairs; there would be no invasion of the foreign government's sovereignty since Cuba itself sought the process of United States law; and there would be no burden on international trade, nor risk to innocent purchasers, since the sole question is whether one party has defenses that fairly curtail the recovery sought by the other party. Hence, says First National City, this Court should not apply the act of state doctrine here.

First National City contends further that without the bar of the act of state doctrine, we can and must hold in its favor—that it is entitled to set off against Banco Nacional's claim for relief such amount as may be due and owing it from the Cuban government as compensation for its confiscated Cuban property. Its argument in this regard runs as follows: In *Sabbatino*, we held that Cuba's seizures of property of United States nationals pursuant to Cuban Law No. 851 were in violation of international law. *Banco Nacional de Cuba v. Sabbatino*, 307 F.2d 845 (2d Cir. 1962). That substantive determination was not questioned by the Supreme Court in reversing us in *Sabbatino*, for the Supreme Court decided only that the Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign. When this restraint was removed by the Hickenlooper Amendment, this Court was "unable to find any convincing reason, based on argument or new authority, for altering our holding in the original appeal," 383 F.2d at 183; and so we reaffirmed our previous holding that Cuban taking was invalid under international law. *Banco Nacional v. Farr*, 383 F.2d 166 (2d Cir.), cert. denied, 390 U.S. 956 (1967). When the instant case came here, we felt that the restraint on an examination of validity, recognized in the Supreme Court's decision in *Sabbatino*, precluded the result we had reached in *Farr* because the Hickenlooper Amendment did not apply. Now, says First National City, the situation is altered by the subsequent expression of views by the State Department; and hence, in conformity with our decision in *Bernstein*, we should respond by following our decision on the merits in *Farr*, with respect to the same Cuban law.

We disagree. First National City's arguments are based wholly on the assumption that the so-called *Bernstein* exception to the act of state doctrine applies here since the State Department has written a letter. We felt that that assumption is erroneous. *Bernstein* arose out of a unique set of circumstances calling for special treatment, and hence should be narrowly construed and, insofar as is possible, limited to its facts.



As shown above, the facts in *Bernstein* were most unusual, to say the least, and bear no resemblance to those in the instant case. The acts of state there were performed by a German government with which this country had gone to war and which was no longer in existence at the time of the State Department's letter. Here, on the other hand, we have never been at war with Castro's Cuban government, and that government is both extant and recognized by the United States. Again, unlike the situation here, the State Department's letter in *Bernstein* was written during the aftermath of a great world war; and the Nazi government's actions, such as those of which Bernstein complained, had been condemned throughout the world as crimes against humanity. Furthermore, the letter in *Bernstein* went so far as to indicate that it was the affirmative policy of our government to restitute identifiable property to *all* those victimized by the Nazi confiscation, not merely, as the letter indicates in this case, to those who assert counterclaims or setoffs.

The Executive itself seems to have recognized the uniqueness of *Bernstein*, for the Solicitor General's Brief as Amicus Curiae before the Supreme Court in the *Sabbatino* case states:

"The circumstances leading to the State Department's letter in the *Bernstein* case were of course most unusual. The governmental acts there were part of a monstrous program of crimes against humanity; the acts had been condemned by an international tribunal after a cataclysmic world war which was caused, at least in part, by acts such as those involved in the litigation, and the German State no longer existed at the time of State Department's letter. Moreover, the principal of payment of reparations by the successor German government had already been imposed, at the time of the '*Bernstein* letter,' upon the successor government, so that there was no chance that a suspension of the act of state doctrine would affect the negotiation of the reparations settlement."

There is still another important distinction between *Bernstein* and the case at bar. In *Bernstein*, as should be clear, the balance of equities was almost entirely on the side of the party opposing application of the act of state doctrine, the plaintiff, whereas here, as we found in our prior decision in this case, the contra is true, since First National City is seeking a windfall at the expense of other creditors. 431 F.2d, at 404n. 18.

In actual practice, as the Solicitor General's Amicus Brief in *Sabbatino* also recognizes, the *Bernstein* exception has been an exceedingly narrow one. Prior to the present case, a "Bernstein letter" has been issued only once—in the *Bernstein* case itself. Moreover, the case has never been followed successfully; it has been relied upon only twice, and in both of those instances, by lower courts whose decisions were subsequently reversed. *Banco Nacional de Cuba v. Sabbatino*, 307 F.2d 845, 857-58 (2d Cir. 1962), *rev'd*, 376 U.S. 398 (1964); *Kane v. National Institute of Agrarian Reform*, 18 Fla. Supp. 116 (Fla. Cir. Ct. 1961), *rev'd*, 153 So. 2d 40 (Fla. App. 1963).<sup>2</sup> The Supreme Court has never passed on the validity of the *Bernstein* exception; indeed, in *Sabbatino* it carefully avoided making any such determination. 376 U.S. at 420.

Furthermore, the Court in *Sabbatino* seemed to recognize one of the distinctions described above between a

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<sup>2</sup> The *Bernstein* case has, in a few other instances, been cited, but not in relevant situations. For example, in *Zwack v. Kraus Bros. & Co.*, 237 F.2d 255 (2d Cir. 1956) and *Republic of Iraq v. First National City Bank*, 241 F. Supp. 567 (S.D.N.Y. 1965), the case was cited, although no Bernstein letter had been filed and the issue in the cases involved property located in the United States and hence not subject to the Act of State doctrine. In a few other instances the *Bernstein* case has been mentioned in passing, merely as an exception to the act of state doctrine. *Banco Nacional v. Farr*, 243 F. Supp. 957 (D.C.N.Y. 1965); *Palicio v. Brush*, 256 F. Supp. 481 (D.C.N.Y. 1966); *Wyman v. United States*, 166 F. Supp. 766, 769 (Ct. Cl. 1958). In *Menendez Rodrigues v. Pan American Life Insurance Co.*, 311 F.2d 429 (5th Cir. 1962), the court treated the correspondence referred to in our decision in *Sabbatino*, as a Bernstein letter; but, as is noted above, our decision in *Sabbatino* was reversed by the Supreme Court.

*Bernstein*-type case and a case such as the one at bar. In discussing when the act of state doctrine should be applied, the Court stated that "[t]he balance of relevant considerations may . . . be shifted if the government which perpetrated the challenged act of state is no longer in existence, as in the *Bernstein* case, for the political interest of this country may, as a result, be measurably altered. Therefore, . . . we decide only that the Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign government, extant and recognized by this country at the time of suit, in the absence of a treaty or other unambiguous agreement regarding controlling legal principles, even if the complaint alleges that the taking violates customary international law." 376 U.S. at 428. It is clear that the confiscation of First National City's property in Cuba by the extant and recognized Cuban government comes within this holding, and the thrust of the entire decision in *Sabbatino* is contrary to recognizing exceptions to the act of state doctrine in such cases.

For these reasons, we conclude that *Bernstein* is best left narrowly limited to its own peculiar facts and that, despite the State Department's letter of November 17, 1970, the exception to the act of state doctrine created by that case is inapplicable to the case at bar. Rather, we still find persuasive those cogent policy reasons for applying the doctrine which were articulated by Mr. Justice Harlan in *Sabbatino* and set forth in our prior opinion at 431 F.2d 397-99. Since we hold that the State Department's letter here does not bring this case within the narrow *Bernstein* exception, it is plain that that letter does not relieve us from applying the act of state doctrine to bar examination of the validity of the Cuban expropriation of First National City's property there.

Accordingly, we adhere to our prior decision and reverse and remand this case for further proceedings consistent with that decision and this.

## APPENDIX

THE LEGAL ADVISER

DEPARTMENT OF STATE

WASHINGTON

NOVEMBER 17, 1970

Honorable E. Robert Seaver  
Clerk of the Court  
United States Supreme Court

Dear Mr. Seaver:

The case of *First National City Bank v. Banco Nacional de Cuba* is before the Supreme Court on petition for a writ of *certiorari*, No. 846 filed October 13, 1970. The case involves a claim by Banco Nacional for excess collateral it had pledged with City Bank to secure a loan and a counterclaim by City Bank, up to the amount claimed by Banco Nacional, based upon Cuba's expropriation, without compensation, of property of City Bank in Cuba in 1960.<sup>1</sup> The Court of Appeals for the Second Circuit held that the exception to the Act of State doctrine created by 22 U.S.C. § 2370(e)(2)<sup>2</sup> did not apply to City Bank's claim against

<sup>1</sup> The District Court determined that Banco Nacional and the Government of Cuba are one and the same for purposes of this litigation.

<sup>2</sup> "(2) Notwithstanding any other provision of law, no court in the United States shall decline on the ground of the federal act of state doctrine to make a determination on the merits giving effect to the principles of international law in a case in which a claim or title or other right to property is asserted by any party including a foreign state (or a party claiming through such state) based upon (or traced through) a confiscation or other taking after January 1, 1959, by an act of that state in violation of the principles of international law, including the principles of compensation and the other standards set out in this subsection: *Provided*, That this subparagraph shall not be

Cuba and that the Act of State doctrine, as expressed by the Supreme Court in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964), barred adjudication of City Bank's counterclaim.

The Department of State believes this second holding involves matters of importance to the foreign policy interests of the United States and requests that our views be conveyed to the Supreme Court.<sup>3</sup>

The Executive's role in suggesting that the act of state doctrine should not be applied with respect to a certain case or class of cases has been recognized both by the Department of State and in court decisions. This role, the so-called *Bernstein* exception to the act of state doctrine as applied by United States courts, was first clearly established in *Bernstein v. N.V. Nederlandsche Amerikaansche, Etc.*, 210 F.2d 375 (2nd Cir. 1954), where the court reversed its earlier holding, 173 F.2d 71 (2nd Cir. 1949), that the act of state doctrine precluded the court's adjudication of the validity of certain acts of the (Nazi) German Government. The basis for this reversal was a statement by Jack B. Tate, Acting Legal Adviser, Department of State, indicating that

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applicable (1) in any case in which an act of a foreign state is not contrary to international law or with respect to a claim of title or other right to property acquired pursuant to an irrevocable letter of credit of not more than 180 days duration issued in good faith prior to the time of the confiscation or other taking, or (2) in any case with respect to which the President determines that application of the act of state doctrine is required in that particular case by the foreign policy interests of the United States and a suggestion to this effect is filed on his behalf in that case with the court." (Foreign Assistance Act of 1965, Sec. 620(e)(2), 22 U.S.C. § 2370(e)(2)).

<sup>3</sup> We regret that our views could not have been brought to the attention of the lower courts. Unfortunately, it was only after the not-yet-published opinion of the Second Circuit Court of Appeals was handed down that the question of the appropriateness of State Department action arose, since it did not become clear until that time that the *Sabbatino* Amendment would be considered inapplicable. No formal request for a statement by the Department was made in this case until October 14, 1970, one day after the petition for writ of *certiorari* was filed.

"The policy of the Executive, with respect to claims asserted in the United States for restitution of such property (or compensation in lieu thereof) lost through force, coercion or duress as a result of Nazi persecution in Germany, is to relieve American courts from any restraint upon the exercise of their jurisdiction to pass upon the validity of the acts of Nazi officials."

210 F.2d at 376. Thus the Executive had indicated that the act of state doctrine need not be applied in a certain class of cases; the applicability of the statement was not limited to the *Bernstein* case.

In *Banco Nacional de Cuba v. Sabbatino*, *supra*, the Supreme Court held that the act of state doctrine precluded the examination of the validity of the act of a foreign sovereign within its own territory, even where that act was allegedly a violation of international law. 376 U.S. at 436-37. The ruling was based on the Court's recognition of the Executive's prerogatives in the area of foreign affairs; it found the act of state doctrine "arising out of the basic relationships between branches of government in a separation of powers." *Id.* at 423. However, the Court specifically avoided ruling on the validity of the *Bernstein* exception. *Id.* at 436.

While the Department of State in the past has generally supported the applicability of the act of state doctrine, it has never argued or implied that there should be no exceptions to the doctrine. In its *Sabbatino* brief, for example, it did not argue for or against the *Bernstein* principle; rather it assumed that judicial consideration of an act of state would be permissible when the Executive so indicated, and argued simply that the exchange of letters relied on by the lower courts in *Sabbatino* constituted "no such expression in this case." Brief of the United States, page 11.

Recent events, in our view, make appropriate a determination by the Department of State that the act of state doctrine need not be applied when it is raised to bar

adjudication of a counterclaim or setoff when (a) the foreign state's claim arises from a relationship between the parties existing when the act of state occurred; (b) the amount of the relief to be granted is limited to the amount of the foreign state's claim; and (c) the foreign policy interests of the United States do not require application of the doctrine.

The 1960's have seen a great increase in expropriations by foreign governments of property belonging to United States citizens. Many corporations whose properties are expropriated, financial institutions for example, are vulnerable to suits in our courts by foreign governments as plaintiff, for the purpose of recovering deposits or sums owed them in the United States without taking into account the institution's counterclaims for their assets expropriated in the foreign country.

The basic considerations of fairness and equity suggesting that the act of state doctrine not be applied in this class of cases, unless the foreign policy interests of the United States so require in a particular case, were reflected in *National City Bank v. Republic of China*, 348 U.S. 356 (1956), in which the Supreme Court held that the protection of sovereign immunity is waived when a foreign sovereign enters a U.S. court as plaintiff. While the Court did not deal with the act of state doctrine, the basic premise of that case — that a sovereign entering court as plaintiff opens itself to counterclaims, up to the amount of the original claim, which could be brought against it by that defendant were the sovereign an ordinary plaintiff — is applicable by analogy to the situation presented in the present case.

In this case, the Cuban government's claim arose from a banking relationship with the defendant existing at the time the act of state — expropriation of defendant's Cuban property — occurred, and defendant's counterclaim is limited to the amount of the Cuban government's claim. We find, moreover, that the foreign policy interests of the United States do not require the application of the act of state doctrine to



bar adjudication of the validity of a defendant's counterclaim or set-off against the Government of Cuba in these circumstances.

The Department of State believes that the act of state doctrine should not be applied to bar consideration of a defendant's counterclaim or set-off against the Government of Cuba in this or like cases.

Sincerely yours,

JOHN R. STEVENSON.

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HAYS, *Circuit Judge* (dissenting):

By refusing to apply the exception to the act of state doctrine announced by this court in the third *Bernstein* case, *Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij*, 210 F.2d 375 (2d Cir. 1954), the majority is engaging in precisely the kind of judgment which the act of state doctrine has removed from judicial determination.

The majority's attempt to distinguish *Bernstein* shows a misapprehension of the basis upon which the *Bernstein* exception was formulated. *Bernstein* was a per curiam opinion in which this court set forth part of the text of a State Department letter. The court, making no independent evaluation of the letter itself, then stated that "[i]n view of this supervening expression of Executive Policy, we amend our mandate in this case by striking out all restraints based on the inability of the court to pass on acts of officials in Germany during the period in question." *Id.* at 376. Considerations such as the acts of the Nazi government, the fact that we were at war with the government in question, and the fact that that government no longer existed, all used by the majority to distinguish *Bernstein*, were set forth not by the court but by the State Department in its letter. Unless the majority wishes to overrule *Bernstein*, it must accept the *Banco Nacional* letter as an expression of Execu-

tive Policy and go no further. In *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 420 (1964), the Court held that there had been no expression of Executive Policy.

More fundamental than a mere lack of conformity with *Bernstein*, however, is the fact that the majority, by applying the act of state doctrine after an independent evaluation of the merits of the State Department's decision, is usurping the same executive prerogative which it is the function of that doctrine to preserve. The recognition of this conflict is the very reason for the *Bernstein* exception. The fundamental premise behind the act of state doctrine is that "[t]he conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative—the political—Departments of the Government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision." *Oetjen v. Central Leather Co.*, 246 U.S. 297, 302 (1918). It is not the function of the courts to choose between competing foreign policy considerations and conclude that Nazi Germany is "bad" and that Cuba is "good." The attitude of the United States toward foreign powers must be left, as in *Bernstein*, to the decision of the other branches of government. As the Court said in *Sabbatino*, in discussing the related issue of a judicial determination of the right of a foreign country to sue in our courts, "[t]his Court would hardly be competent to undertake assessments of varying degrees of friendliness or its absence. . . ." *Banco Nacional de Cuba v. Sabbatino*, *supra* at 410. The majority has undertaken just such an assessment and, in doing so, ignores both the exception to the act of state doctrine in *Bernstein*, and the fundamental purpose of the doctrine itself. I must dissent from what I consider to be a deviation from our judicial function.

**Order, Dated and Entered October 12, 1971**

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**SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 1971**

**No. 70-295**

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**FIRST NATIONAL CITY BANK,**

*Petitioner,*

**v.**

**BANCO NACIONAL DE CUBA,**

*Respondent.*

---

**ORDER**

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**The petition for a writ of certiorari is granted.**



# Supreme Court of the United States

No. 70-295 ---, ~~October Term, 19~~

**First National City Bank,**

**Petitioner,**

v.

**Banco Nacional de Cuba**

ORDER ALLOWING CERTIORARI. Filed **October 12, -----, 19 71.**

The petition herein for a writ of certiorari to the United States Court of Appeals for the **Second -----** Circuit is granted.

FILE COPY

FILED

JUN 17 1971

E. ROBERT SEEVER, CLERK

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1970

No. \_\_\_\_\_

~~1840~~ 70-295

FIRST NATIONAL CITY BANK,

*Petitioner,*

*against*

BANCO NACIONAL DE CUBA,

*Respondent.*

**PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT**

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# I N D E X

	PAGE
Opinions Below -----	1
Jurisdiction -----	2
Questions Presented -----	2
Statutes Involved -----	3
Statement -----	3
Reasons for Granting the Writ -----	6
Summary of Argument -----	7
Argument -----	7
I. The Decision of the Court Below is not Responsive to the Mandate of this Court -----	7
II. The Majority Below has Usurped an Executive Prerogative -----	9
III. The Legislative Branch has Determined that the Act of State Doctrine should not be Applied in Cases of this Nature -----	12
IV. The Act of State Doctrine is not Applicable to Cases of this Nature -----	14
Conclusion -----	16
Opinion on Remand of the United States Court of Appeals For the Second Circuit -----	A-1
Order of the Supreme Court -----	B-1
Memorandum of the Solicitor General transmitting State Department Letter -----	C-1
Opinion of the United States Court of Appeals for the Second Circuit -----	D-1
Opinion and Order of the United States District Court for the Southern District of New York -----	E-1

## Statutes

Foreign Assistance Act of 1961, 22 U.S.C.	
§ 2370(e)(1) -----	F-1
Foreign Assistance Act of 1961, 22 U.S.C.	
§ 2370(e)(2) -----	F-2
International Claims Settlement Act of 1949, 22	
U.S.C. §§ 1621 et seq. -----	F-2
§ 1623(h) -----	F-2
§ 1643 -----	F-3
§ 1643b -----	F-3
§ 1643e -----	F-4
Cuban Statutes	
Cuban Law of Nationalization No. 851 -----	F-4
Fundamental Law of Cuba -----	F-8
Letter of Cecil J. Olmstead -----	G-1

## TABLE OF AUTHORITIES

## PAGE

## Cases:

<i>Banco Nacional de Cuba v. Farr</i> , 383 F. 2d 186 (2nd Cir. 1967), cert. den. 390 U.S. 956 -----	6, 12, 13
<i>Banco Nacional de Cuba v. Sabbatino</i> , 376 U.S. 398 (1964) -----	9, 10, 11
<i>Banco Nacional de Cuba v. Sabbatino</i> , 307 F. 2d 845 (2nd Cir. 1962) -----	15
<i>Bernstein v. N.V. Nederlandsche-Amerikaan- sche, etc.</i> , 173 F. 2d 71 (2nd Cir. 1949) -----	10
<i>Bernstein v. N.V. Nederlandsche-Amerikaan- sche, etc.</i> , 210 F. 2d 375 (2nd Cir. 1954) -----	6, 10
<i>Ex parte Peru</i> , 318 U.S. 578 (1943) -----	11
<i>In the Matter of the Claim of First National City Bank</i> , F.C.S.C. Dec. No. CU-3835, November 14, 1969 -----	3, 6, 15
<i>National City Bank v. Republic of China</i> , 348 U.S. 356 (1955) -----	6, 7, 14
<i>Pons v. Republic of Cuba</i> , 294 F. 2d 925 (D.C. Cir. 1961) -----	15
<i>Republic of Mexico v. Hoffman</i> , 324 U.S. 495 (1940) -----	6, 11
<i>Russian Volunteer Fleet v. United States</i> , 282 U.S. 481 (1931) -----	6, 13
<i>The Paquete Habana</i> , 175 U.S. 677 (1900) -----	10
<i>United States v. Belmont</i> , 301 U.S. 324 (1936) -----	11
<i>United States v. National City Bank</i> , 83 F. 2d 236 (2nd Cir. 1936) -----	15

*Statutes:*

Amendment V, United States Constitution ----	15
Article 3, § 2, United States Constitution -----	10
Cuban Law of Nationalization No. 851 ----	3, 5, 12, 13
Foreign Assistance Act of 1961, 22 U.S.C.	
§ 2370(e)(1), (2) (Hickenlooper Amendment) -----	2, 3, 6, 7, 12, 13, 16
Fundamental Law of Cuba, Art. 24 -----	3, 5, 15
International Claims Settlement Act of 1949, 22 U.S.C. §§ 1621 <i>et seq.</i> -----	3, 6, 16

*Miscellaneous:*

Hackworth, DIGEST OF INTERNATIONAL LAW, Vol. III -----	15
Hearings before the House Committee on For- eign Affairs on H. R. 7750, 89th Cong., 1st Sess. (1965), 1306 -----	12, 13
Lillich, <i>International Law, 1970 Survey of New     York Law</i> , 22 Syracuse L. Rev. 269-80 (1971)	12
Note, 11 Va. J. Int'l Law 406 (1971) -----	12
Rules of the Supreme Court of the United States, Rule 19 -----	14, 16

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1970

---

No. \_\_\_\_\_

---

FIRST NATIONAL CITY BANK,  
*Petitioner,*

*against*

BANCO NACIONAL DE CUBA,  
*Respondent.*

---

**PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT**

First National City Bank (formerly known and sued herein as The First National City Bank of New York) petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit on remand, reinstating its earlier judgment, which reversed a final order and judgment of the United States District Court for the Southern District of New York granting summary judgment for petitioner and dismissing the action on the merits. This Court vacated that earlier judgment of the court of appeals and directed reconsideration in light of the views of the Department of State expressed in its letter dated November 17, 1970.

**Opinions Below**

The majority and dissenting opinions in the court of appeals (Appendix A) are not reported. The order of this Court (Appendix B) is reported at 400 U.S. 1019 (1971).

The earlier opinion of the court of appeals (Appendix D) is reported at 431 F.2d 394, and the opinion of the district court (Appendix E) is reported at 270 F. Supp. 1004.\*

### **Jurisdiction**

The judgment of the court of appeals was entered April 27, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

### **Questions Presented**

1. When this Court has vacated a judgment of a court of appeals and has remanded the case to that court for reconsideration in the light of views expressed by the Department of State, may that court reinstate its judgment in disregard of those views upon the ground that the court of appeals disagrees with the conclusions reached by the Department of State?

2. May a court in the United States decline on the ground of the federal act of state doctrine to permit a United States national, as defendant, to offset against the claim of a foreign government plaintiff its claim for compensation for property confiscated by that foreign government, where the Executive Branch, through the Department of State, has made a finding that the foreign policy interests of the United States do not require application of the act of state doctrine and has expressed the view that the act of state doctrine should not be applied?

3. Do the words "right to property" in the Hickenlooper amendment include intangibles, such as a claim for compensation for confiscated property, or is the statute limited to tangible personal property, such as sugar or oil?

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\* Figures and letters in parentheses identify the pages of the Appendices (App.) to this petition and of the Joint Appendix (JA) filed in connection with petitioner's earlier Petition for Writ of Certiorari herein, No. 846, October Term, 1970, to which reference is made.

4. In an action instituted in a court of the United States may the foreign government plaintiff contest, on the basis of its own municipal laws, a United States defendant's claim for compensation for its confiscated property when the validity and amount of that claim has been finally determined by the Foreign Claims Settlement Commission?

5. When a court in the United States has adjudicated that a confiscation is in violation of international law, may it thereafter decline, on the ground of the act of state doctrine, to follow its own decision in a subsequent case brought by the same plaintiff against a different United States national, involving the same foreign government and the same foreign acts and laws?

### **Statutes Involved**

The Foreign Assistance Act of 1964, as amended, 22 U.S.C. § 2370(e)(1), (2) (Hickenlooper Amendment), Fundamental Law of Cuba, Article 24, Law No. 851 of Cuba and the International Claims Settlement Act of 1949, as amended, 22 U.S.C. §§ 1643-1643k, 1623(h), are set forth in Appendix F.

### **Statement**

Petitioner, a national banking association, has a claim against the Government of Cuba, based on the taking of petitioner's property in September 1960. The validity of this claim was determined by the Foreign Claims Settlement Commission (the "Commission") pursuant to Title V of the International Claims Settlement Act of 1949, as amended, and the Commission determined the amount of the claim to be \$4,863,731.04 plus interest after deduction of petitioner's recoveries against Cuba, including the offset hereafter described.

Respondent is an instrumentality of the Government of Cuba acting in this case for and on behalf of Cuba<sup>1</sup>; for

<sup>1</sup> The district court found that "There is no serious question that the Government of Cuba and Banco Nacional are one and the same for purposes of this litigation". (App. E-4) Respondent "at various times has argued that defendant's (petitioner's) claim against the Cuban Government cannot be asserted against Banco Nacional, an entirely separate entity." (App. E-4 n. 3) This argument was renewed on appeal, but the court below did not pass on it.



purposes of this petition the plaintiff-respondent is the Government of Cuba. It commenced this action in the District Court for the Southern District of New York to recover \$2,347,000, alleging federal jurisdiction under 28 U.S.C. § 1332. The claim arose out of petitioner's withholding from respondent the excess proceeds of collateral originally pledged by respondent on a loan to respondent by petitioner.

Petitioner asserted an offset in the amount of the value of its seized Cuban property. The district court, Judge Bryan, held this offset proper; and, upon the stipulation of the parties that the offset exceeded the amount of respondent's claim, entered judgment for petitioner.

Respondent appealed and the court of appeals, holding that allowance of the offset was error, reversed.

Petitioner then sought a writ of certiorari from this Court, and the Solicitor General, transmitting a letter of the Department of State (App. C-2), filed a memorandum suggesting that this Court remand the case to the court of appeals (App. C-1). This Court granted the writ, vacated the judgment of the court of appeals and remanded the case for reconsideration in light of the views expressed by the Department of State. On remand, the majority of the same panel of the court below (Judge Hays dissenting) reinstated its earlier judgment notwithstanding the Department's views. The majority opinion by Chief Judge Lumbard (in which District Judge Blumenfeld, sitting by designation, concurred) appears at App. A-2; the dissenting opinion by Circuit Judge Hays at App. A-11.

There is no dispute as to the facts. From August, 1915 until September, 1960, petitioner maintained branch offices in Cuba, pursuant to Section 25 of the Federal Reserve Act and Cuban law. (JA 14a; 17a; 25a) On September 16, 1960, petitioner operated eleven branches in Cuba (JA 14a; 25a).

In 1958, Cuba applied to petitioner for a loan for government purposes. Petitioner made the loan, in the initial principal amount of \$15,000,000, secured by obligations of the United States Government and the International Bank for Reconstruction and Development (the "collateral"). The loan was made, and the collateral received in pledge, at petitioner's head office in New York City on July 8, 1958.

At the request of Cuba, the original one year maturity was extended for another year. In July 1960, Cuba proposed to pay \$5,000,000 on account of principal, against release to it of a proportionate amount of the collateral (which was done), and to defer payment of the balance for a further period of one year from July 8, 1960. Petitioner agreed to this proposal upon the express proviso that the continuance of the loan was predicated upon a continuance of conditions then existing in Cuba. Documentation covering the extension was sent to Cuba for execution, but was never returned.

More or less simultaneously, Cuba enacted Law of Nationalization No. 851 (App. F-4) and thereafter on September 16, 1960, the Cuban Government seized petitioner's branches in Cuba and turned them over to respondent, which is still in possession and control of those properties. The Fundamental Law of Cuba (App. F-8) and Cuban Law No. 851 (App. F-6) specify that compensation shall be paid for property taken by the Cuban Government, but no compensation has been paid to petitioner.

As the \$10,000,000 loan was then due, petitioner exercised its right to sell the collateral for the loan, which yielded proceeds of \$11,892,448.41, according to petitioner's records (JA 62a), from which principal and interest due were deducted, leaving an excess of \$1,810,081.51. Although the amount of petitioner's offset is in dispute, the parties have stipulated for the purpose of this action that the amount of the petitioner's claim exceeds the amount of

the excess collateral. (The Commission later determined the value of the seized branches to be \$9,510,000.00.)

Petitioner's claim is asserted as a defensive counter-claim only; that is, as an offset against the claim for excess collateral. Petitioner seeks no affirmative judgment against Cuba in this action.

### **Reasons for Granting the Writ**

This case raises important questions as to (1) the federal act of state doctrine; (2) the effect of the view expressed by the Department of State that the doctrine should not be applied in this case, based upon the Department's finding that the foreign interests of the United States do not require application of the doctrine; (3) the so-called Hickenlooper Amendment (22 U.S.C. § 2370(e)(2)); and (4) the International Claims Settlement Act of 1949, as amended (22 U.S.C. §§ 1643-1643k, 1623(h)) that have not been, but should be, settled by this Court. A constitutional issue is raised by the determination below that this petitioner should be denied the right to offset a liability found to exist (1) in another case in the same court (*Banco Nacional de Cuba v. Farr*, 383 F.2d 166 (2nd Cir. 1967), *cert. den.*, 390 U.S. 956) involving the same plaintiff and the same foreign act of state, and (2) in respect of the parties to this action by the Foreign Claims Settlement Commission pursuant to the International Claims Settlement Act of 1949, as amended. The decision below is in conflict with decisions of this Court. *National City Bank v. Republic of China*, 348 U.S. 356 (1955); *Republic of Mexico v. Hoffman*, 324 U.S. 30 (1945); *Russian Volunteer Fleet v. United States*, 282 U.S. 481 (1931).

Moreover, the decision so far departs from the prior decisions of the court below (*Banco Nacional de Cuba v. Farr*, *supra*; *Bernstein v. N. V. Nederlandsche-Amerikaansche, etc.*, 210 F.2d 375 (2nd Cir. 1934), as to require an exercise of this Court's power of supervision.

## Summary of Argument

The court of appeals disregarded the mandate of this Court to reconsider its views in light of the views of the Department of State. Since the Executive, acting through the Department of State, has made it known to this Court that the foreign policy of the United States does not require application of the act of state doctrine in this case, the continued application of the doctrine below was erroneous and denied petitioner due process of law. Furthermore, Congress, in the Hickenlooper Amendment, has directed that the act of state doctrine not be applied as a bar to petitioner's claim. Even if the Executive and Legislative Branches had not acted, enforcement of petitioner's counterclaim is not affected by the act of state doctrine, under the rule stated by this Court in *Republic of China, supra*.

## Argument

### I

*The Decision of the Court Below is not Responsive to the Mandate of this Court.* By order dated January 25, 1971, this Court vacated the judgment of the court of appeals, rendered July 16, 1970, and remanded the case to the court of appeals "for reconsideration in light of the views of the Department of State expressed in its letter dated November 17, 1970, and transmitted to this Court by the Solicitor General." (App. B).

The court below recognized that the views of the Department of State were (1) "that the act of state doctrine does not bar consideration of a claim for compensation asserted as a defensive counterclaim or offset limited to the amount of a claim made in a United States court by a foreign government, arising out of a relationship between the parties when the act of state occurred, and where the foreign policy interests of the United States do not require application of the doctrine." (App. A-4); (2) that "the foreign policy interests of the United States do not require the application

of the act of state doctrine to bar adjudication of the validity of a defendant's counterclaim or set-off against the Government of Cuba in these circumstances." (App. A-4); and (3) that "the act of state doctrine should not be applied to bar consideration of a defendant's counterclaim or set-off against the Government of Cuba in this or like cases." (App. A-4).

The majority of the panel, however, disagreed with those views, and declined, on the ground of the act of state doctrine, to adjudicate the validity of petitioner's defensive counterclaim or offset. (App. A-11).

In his dissenting opinion, Judge Hays pointed out that "by applying the act of state doctrine after an independent evaluation of the merits of the State Department's decision," the majority "is usurping the same executive prerogative which it is the function of that doctrine to preserve." (App. A-12).

The posture of this case, when it first came to the court of appeals, was that the district court had sustained petitioner's counterclaim on the merits. The court of appeals did not disturb that determination, but reversed on the ground that the act of state doctrine precluded it, and should have precluded the district court, from making an adjudication on the merits. The Department of State then expressed the view that the act of state doctrine need not and should not be a bar to petitioner's counterclaim. This Court's direction to reconsider the case in the light of those views has been ignored by the majority of the court below, which, notwithstanding the views of the State Department, has persisted in its own conclusion that the act of state doctrine operates as a bar.

By declining to give effect to the Executive decision, the majority failed to comply with the mandate of this Court. The views of the Executive were transmitted to this Court by the Solicitor General and this Court thereupon directed the court below to reconsider its earlier decision in the light

of those views; it did not authorize a reconsideration of the views themselves.

Whether or not the majority, in making an independent evaluation of the State Department's views, was "usurping the executive prerogative" (to use Judge Hays' phrase), it was error to disregard those views when this Court had ordered reconsideration in their light.

## II

*The Majority Below has Usurped an Executive Prerogative.* Judge Hays pointed out in his dissenting opinion that the majority of the court below engaged in "precisely the kind of judgment which the act of state doctrine has removed from judicial determination." (App. A-11) In *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964), the Executive Branch suggested to this Court that the adjudication there, by the same court of appeals, was an invasion, however inadvertent, of the field of foreign relations reserved to the Executive by the Constitution.<sup>2</sup> In this case, the foreign policy determination has been made explicitly by the Executive<sup>3</sup> and that determination has been adopted by this Court as a guideline for the court below. 400 U.S. 1019. In these circumstances, the insistence of the majority below upon making an independent evaluation of the merits of the Executive's foreign policy determination

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<sup>2</sup> "Assuming that judicial consideration of the validity of a foreign act of state should not be foreclosed in the unusual case where the Executive formally expresses its judgment that the reasons for the doctrine do not call for recognition of the foreign act, the plain fact, we submit, is that there has been no such expression in this case. Nor should this Court hold, for the first time, that executive silence regarding the act of state doctrine is equivalent to executive approval of judicial inquiry into the foreign act." (Brief for the United States as *Amicus Curiae*)

<sup>3</sup> "We find . . . that the foreign policy interests of the United States do not require the application of the act of state doctrine to bar adjudication of the validity of a defendant's counterclaim or set-off against the Government of Cuba in these circumstances. . . . The Department of State believes that the act of state doctrine should not be applied to bar consideration of a defendant's counterclaim or set-off against the Government of Cuba in this or like cases." (App. C-6, 7)



is indeed a usurpation of the very Executive prerogative which it is the function of the act of state doctrine to preserve.

The first duty of the Judicial Branch is to adjudicate the cases and controversies that come before it. U.S. Constitution, Art. 3, § 2. It must discharge that obligation unless to do so would frustrate another constitutional dictate, in this instance, assignment of the conduct of the foreign relations of the United States to the Executive and Legislative Departments of Government. Mr. Justice Harlan's opinion in *Sabbatino* makes clear that deference to the Executive is the essential reason for the Judicial Branch's declination to execute its constitutional mandate to determine cases and controversies before it in accordance with the principles of law, including international law<sup>4</sup>.

Judicial deference is predicated upon the presumption that any adjudication which so much as calls in question the validity of a foreign act of state may embarrass the Executive in the conduct of the foreign relations of the United States and thus be an impermissible invasion of our own government's sovereignty. *Bernstein v. N.V. Nederlandsche-Amerikaansche, etc.*, 173 F.2d 71 (2nd Cir. 1949); *Sabbatino, supra*. But this presumption may be rebutted, and was so rebutted in the last *Bernstein* case, 210 F.2d 375 (2nd Cir. 1954). *Bernstein* was a case where a determination by the Executive within its own special field of competence—the conduct of the foreign relations of the United States—provided guidance to the Judicial Branch by rebutting the presumption, and thus removed the bar of the act of state doctrine.

It is evident from the opinion on remand that the majority of the court of appeals refused to give effect to the State Department letter because they disagreed with the content of the letter. The extensive discussion of the facts in *Bernstein*, and the effort to distinguish this case, reveals that court's preoccupation with considerations that

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<sup>4</sup>In *The Paquete Habana*, 175 U.S. 677 (1900), at 700, this Court said:

"International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination."



might properly be weighed by the Executive in determining American policy on a political matter. The opinion is an apparent effort by the court of appeals to correct or revise the Executive determination; but nowhere does the majority deal with the legal issue—the effect of the official expression of the Executive's views on a political question dealing with foreign relations.

Respondent argued, and evidently persuaded the majority below, that “the Act of State doctrine has little to do with considerations of fairness and equity; it is based on reasons of state which have been set forth by the Supreme Court in *Sabbatino*.” (Brief by Plaintiff on Remand, p. 5). But this position cannot be maintained in the context of this litigation. Respondent's argument that the applicability of the act of state doctrine is a “political question” is answered by the Executive's explicit determination that the foreign policy interests of the United States do not require application of the doctrine and that the doctrine should not be applied. Such Executive determinations are followed by the courts. *Cf. Republic of Mexico v. Hoffman*, 324 U.S. 30 (1944); *Ex parte Peru*, 318 U.S. 578 (1943); *United States v. Belmont*, 301 U.S. 324 (1936). Respondent's argument that “only a court can determine which political questions and which foreign relations questions are justiciable” (Respondent's Brief in Opposition to Petition for Certiorari, November 13, 1970, at p. 16) is answered by this Court's mandate to the court of appeals to reconsider this case in the light of the views expressed by the Executive. 400 U.S. 1019.

Inasmuch as the Executive Branch has resolved the political questions raised by this case, and this Court has directed that the case be considered in the light of that resolution, it was error for the majority below to decline to adjudicate petitioner's counterclaim on the merits.

As noted by Judge Hays, in dissent, the fundamental purpose of the act of state doctrine is to preserve the execu-

tive prerogative in the field of foreign policy. The majority below has perverted this purpose by, in effect, making the government of Cuba rather than the Government of the United States the beneficiary of the doctrine.

### III

*The Legislative Branch has Determined that the Act of State Doctrine should not be Applied in Cases of this Nature.* In the district court, Judge Bryan determined this case on the merits as, in his view, he was required to do by the Hickenlooper Amendment to the Foreign Assistance Act of 1964, 22 U.S.C. § 2730(e). "Congress there declared that the courts of this country should not refrain, on the ground of the act of state doctrine, from determining the merits in cases involving a confiscation after January 1, 1959 by an act of a foreign state 'in violation of the principles of international law, including the principles of compensation.' " (App. E-6) 270 F.Supp., 1007. In so doing, the district court gave full effect to the basic desire of Congress to provide such remedies as might be available to victims of foreign confiscations that violated international law, as expressed in the literal words of the statute. It has been determined that the takings under Cuban Law No. 851 violated international law. *Banco Nacional de Cuba v. Farr*, 383 F.2d 166 (2nd Cir. 1967), *cert. den.* 390 U.S. 956.

The court of appeals, indulging in a strained interpretation of congressional intent, which has been severely criticized (R. B. Lillich, *International Law*, 1970 *Survey of New York Law*, 22 Syracuse L. Rev. 269-80 (1971); Note, 11 Va. J. Int'l Law 406 (1971); *compare* Hearings before the House Committee on Foreign Affairs on H. R. 7750, 89th Cong. 1st Sess. (1965), 1306 (Olmstead letter) (Appendix G)) denied effect to the plain words of the statute. In consequence, the court of appeals declined to consider the merits of the petitioner's offset and counterclaim, reversed the district court and directed the entry of judg-

ment on the merits in favor of Banco Nacional de Cuba. This decision by the court below was erroneous in two respects which, we submit, require attention and correction by this Court.

A. The constitutionality of the Hickenlooper Amendment is called into serious question by the construction given it by the court below. That court read the statute as if it provided that a court of the United States was required to adjudicate on the merits only those cases that involved title or other rights to *tangible personal* property that had found its way into the United States and in which a party asserted a claim of title or other right to such property or its proceeds. The simple word *property*, used in the amendment, does not support such a reading. (App. G-3) So read, the statute would require adjudication on the merits only on claims asserted by the owners of particular commodities such as sugar, tobacco or oil, or the proceeds of any of them, and would deny justice to the owners of other classes of property, such as real estate, negotiable instruments or intangibles, or the proceeds of any of them. Any such discriminatory enactment would be constitutionally unsound as irrational, a denial of equal treatment to former owners of property in Cuba and a denial of due process of law to petitioner. The court of appeals erred in interpolating by implication a condition which, to say the least, would raise a grave question as to the constitutional validity of the statute. *Russian Volunteer Fleet v. United States*, 282 U.S. 481 (1931), at 492.

B. The court below's reading of the Hickenlooper Amendment produces anomaly in the law and an inconsistency of decision within the same circuit which should be corrected by this Court. The court below's decision in *Banco Nacional de Cuba v. Farr*, 383 F.2d 166 (2nd Cir. 1967), *cert. den.* 390 U.S. 956, is a holding that Cuban Law No. 851 violated international law and warranted judicial relief to a United States national aggrieved by Cuban

action under it. The decision of the same court in this case now denies judicial relief to a United States national aggrieved by action under that same Cuban law, on the ground that the act of state doctrine precludes judicial examination. This pushes the act of state doctrine beyond the bounds of rationality, and is such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. Rule 19(1)(b), Rules of the Supreme Court of the United States.

#### IV

*The Act of State Doctrine is not Applicable to Cases of this Nature.* This Court decided in *National City Bank v. Republic of China*, 348 U.S. 356 (1955), that considerations of fairness and equity require allowance of a counterclaim in reduction or extinguishment of the claim of a foreign sovereign suing in our courts. Cuba seeks to avoid its obligation to plaintiff in this case just as the sovereign sought to avoid its obligation in *Republic of China*. In each case plaintiff's reliance is on the special privileges of a sovereign. Those privileges are waived when the sovereign voluntarily enters our courts, to the extent that the sovereign then becomes subject to defenses against its claim. *Republic of China, supra.*

The defense of setoff, and the counterclaim, in this case rest on the elementary and universal legal principle that he who takes another's property must pay for it: the Government of Cuba cannot deny that obligation. Although the courts below, and a large part of the briefs of counsel, gave lengthy consideration to the legality of the taking by Cuba of petitioner's eleven branches in 1960, the merits of petitioner's claim do not depend on a determination that the taking was invalid or ineffective to pass title. But petitioner does insist that the taking, legal or illegal, resulted in an obligation to pay fair compensation, and this is so under Cuban law, under American law and under international

law. Fundamental Law of Cuba, Article 24; U.S. Constitution, Amendment V; Hackworth, *DIGEST OF INTERNATIONAL LAW*, Vol. III, 656, 662; authorities collected in *Banco Nacional de Cuba v. Sabbatino*, 307 F.2d 845, 863, n. 11, 12. The validity and amount of petitioner's claim has been finally determined by the Foreign Claims Settlement Commission, *In the Matter of the Claim of First National City Bank*, F.C.S.C. Dec. No. CU-3835, November 14, 1969.

The fundamental question raised by this case is one of fairness. A foreign government has entered our courts as a suitor to seek a money judgment. The defendant asserts countervailing claims that would curtail the amount of the plaintiff's recovery if the plaintiff were a private litigant or the Government of the United States itself. The court below has held that the act of state doctrine prevents this petitioner from asserting a claim which would fairly curtail the recovery of respondent in this case. That is a brutal application of a discretionary rule. As Chief Justice (then Judge) Burger said in dissent in *Pons v. Republic of Cuba*, 294 F.2d 925 (D.C. Cir. 1961), at 927,

"... I do not think we should carry the act of state doctrine to the point where we permit a foreign state to come into our courts as a suitor and secure equitable relief on better or different terms than those available to an American litigant in the same courts."

This rationale is consistent with the view expressed in *United States v. National City Bank*, 83 F.2d 236 (2nd Cir. 1936), *cert. den.* 299 U.S. 563, at 238, as follows:

"If a sovereign state goes into court seeking its assistance, it is in accord with the best principles of modern law that it should be obliged to submit to the jurisdiction in respect of a setoff or counterclaim properly assertable as a defense in a similar suit between private litigants."

The majority below has disregarded the mandate of this Court; it has invaded the province of the Executive Branch; it has distorted the directive of the Legislative Branch as set forth in the Hickenlooper Amendment and has disregarded action under the International Claims Settlement Act; it has deprived petitioner of rights granted to other United States nationals aggrieved by this same respondent under this same Cuban law in circumstances that are pragmatically indistinguishable from this case. The decision of the majority so far departs from the accepted and usual course of judicial proceedings as to call for exercise of this Court's power of supervision. Rule 19, Rules of the Supreme Court of the United States.

### Conclusion

This petition for a writ of certiorari should be granted.

Respectfully submitted,

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June 16, 1971

## APPENDIX A

Opinion, Dated April 27, 1971

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UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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Nos. 798, 799—September Term, 1970.

(Argued March 18, 1971                      Decided April 27, 1971.)

Docket Nos. 32533, 33864

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BANCO NACIONAL DE CUBA,

*Plaintiff-Appellant,*

*v.*

THE FIRST NATIONAL CITY BANK OF NEW YORK,

*Defendant-Appellee.*

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Before :

LUMBARD, *Chief Judge,*

HAYS, *Circuit Judge,* and BLUMENFELD, *District Judge.\**

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Appeal from an order of the District Court for the Southern District of New York, Frederick vanP. Bryan, J., holding the act of state doctrine inapplicable and granting defendant's motion for summary judgment on its counterclaim against plaintiff. After our reversal and remand to the District Court, the Supreme Court remanded this case to us for reconsideration in light of the views of the Department of State.

We adhere to our prior decision and reverse and remand with directions.

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\* Sitting by designation.



VICTOR RABINOWITZ, New York, N. Y. (Rabinowitz, Boudin & Standard on the brief), *for appellant*.

HENRY HARFIELD, New York, N. Y. (Shearman & Sterling, Herman E. Compter and James B. Keenan, on the brief), *for appellee*.

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LUMBARD, *Chief Judge*:

This case comes to us on remand from the Supreme Court for our reconsideration in light of the views of the Department of State expressed subsequent to our original decision which was filed on July 16, 1970. *Banco Nacional de Cuba v. The First National City Bank of New York*, 431 F.2d 394 (2d Cir. 1970). For the reasons stated below, we adhere to our prior decision and reverse and remand to the district court.

In the original action, Banco Nacional de Cuba brought suit against First National City Bank of New York in the Southern District. After the Castro government of Cuba had expropriated First National City's properties there pursuant to Cuban Law No. 851, First National City had sold collateral securing a ten-million-dollar loan it had made to Banco Nacional prior to the change in Cuba's government. From the sale of that collateral, First National City had received an amount—conceded to be at least \$11,892,448 and perhaps as much as \$12,412,000—which was substantially in excess of that required to discharge the ten-million-dollar principal sum and the four per cent interest thereon. Banco Nacional's suit was to recover the excess realized on that sale.

In the district court, First National City raised a series of counterclaims and setoffs based principally on the contention, that, since the Cuban government had confiscated its properties in Cuba in violation of international law, it

was entitled to retain the excess on the sale of the collateral as an offset against the value of its confiscated properties. Judge Bryan in the Southern District granted summary judgment to First National City. *Banco Nacional de Cuba v. The First National City Bank of New York*, 270 F. Supp. 1004 (S.D.N.Y. 1967).

On appeal, we reversed the district court's judgment, holding that Cuba's confiscation of First National City's properties in Cuba was an act of state and that under *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964), the act of state doctrine foreclosed judicial inquiry into the validity of that confiscation under international law. We held further that the Hickenlooper Amendment to the Foreign Assistance Act of 1964<sup>1</sup> did not apply here so as to defeat the act of state doctrine and thereby to give a lender such as First National City the right to apply assets under its control to recoup losses it has suffered by expropriation of its properties in Cuba. Accordingly, we concluded that allowing First National City its claimed offset against the allegedly unlawful expropriation was error; and we remanded to the district court for a factual finding as to the amount by which the proceeds of the sale of the collateral exceeded the amount then owing on the loan—which excess we directed should then be paid to Banco Nacional.

First National City petitioned for a writ of certiorari on October 13, 1970; and on November 17, 1970, the Legal Advisor to the Department of State wrote a letter to the Supreme Court expressing the views of that Department with respect to this case. The State Department's letter is set out in full in an appendix to this opinion. By order dated January 25, 1971, the Supreme Court granted certiorari and remanded the case to us without taking any position on the merits. The Supreme Court's order stated in full:

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<sup>1</sup> 22 U.S.C. § 2370(e)(2), as amended, 79 Stat. 658-59 (Sept. 6 1965).

"846 First National City Bank v. Banco Nacional de Cuba. The petition for a writ of certiorari is granted. The judgment of the Court of Appeals is vacated and the case is remanded to the Court of Appeals for reconsideration in light of the views of the Department of State expressed in its letter dated November 17, 1970, and transmitted to this Court by the Solicitor General. In taking this action, the Court is expressing no views on the merits of the case." 39 U.S.L.W. 3321 (January 26, 1971).

Upon reconsideration, we see no reason to change our initial decision on this appeal.

Basically, the State Department's letter of November 17 expresses the view that the act of state doctrine does not bar consideration of a claim for compensation asserted as a defensive counterclaim or offset limited to the amount of a claim made in a United States court by a foreign government, arising out of a relationship between the parties when the act of state occurred, and where the foreign policy interests of the United States do not require application of the doctrine. It suggests that this Court is relieved from any restraint upon the exercise of its jurisdiction to adjudicate First National City's counterclaim arising out of the confiscation of its Cuban assets. The letter states that in this case

"the foreign policy interests of the United States do not require the application of the act of state doctrine to bar adjudication of the validity of a defendant's counterclaim or set-off against the Government of Cuba in these circumstances.

The Department of State believes that the act of state doctrine should not be applied to bar consideration of a defendant's counterclaim or set-off against the Government of Cuba in this or like cases."

First National City argues that this letter constitutes the requisite statement by the Executive Branch which under our decision in *Bernstein v. N.V. Nederlandsche Amerikaansche, etc.*, 210 F.2d 375 (2d Cir. 1954), relieves the courts from applying the act of state doctrine to bar examination of the validity of the law in question. Because the interpretation of *Bernstein* will be crucial to our determination of the instant case, we set forth the background of *Bernstein* in some detail.

That case involved the alleged confiscation of the property of a single plaintiff, a Jewish German national, by the Nazi German government between 1937 and 1939. Plaintiff alleged that he was compelled by officials of that government, acting through threats of bodily harm, indefinite imprisonment, and death for plaintiff and his family, to assign his property to the German government. Beginning in 1946 the plaintiff sought to attach and recover some of the proceeds of his former property in a suit brought in a state court in New York and removed to the federal district court. In the first *Bernstein* case, *Bernstein v. Van Heyghen Freres Societe Anonyme*, 163 F.2d 246 (2d Cir.), cert. denied, 332 U.S. 772 (1947), we held, in an opinion by Judge Learned Hand, that the act of state doctrine prevented us from inquiring into the validity of the confiscation of the plaintiff's property by the Nazi government; and we therefore affirmed the district court's dismissal of the complaint. However, in the course of his opinion, Judge Hand said that it was a relevant question "whether since the cessation of hostilities with Germany our own Executive, which is the authority to which we must look for the final word in such matters, has declared that the commonly accepted doctrine which we have just mentioned does not apply." 163 F.2d at 249. After full consideration, we concluded that the Executive Branch had not in fact acted to relieve the courts of the restraint imposed by the act of state doctrine.

In the second *Bernstein* case, the same plaintiff brought a conversion action against another defendant—a Dutch

corporation which, in participation in a plan with officials of the Nazi government, had confiscated and converted his stock in a German liability corporation. In that case, we reaffirmed our holding in the first *Bernstein* case that, because of the lack of a definitive expression of Executive policy, the act of state doctrine prevented judicial examination of official acts of the Nazi government. *Bernstein v. N.V. Nederlandsche-Amerikaansche, etc.*, 173 F.2d 71 (2d Cir. 1949). We did remand the case for the purpose of allowing the plaintiff to allege, if he could, that his property had been seized by persons acting in a private capacity; but we ordered him to refrain from alleging matters which would cause the court to pass on the validity of acts of officials of the German government.

Following that decision, the State Department issued a press release quoting a letter from its Acting Legal Advisor. As the release stated, that letter

“repeats this Government’s opposition to forcible acts of dispossession of a discriminatory and confiscatory nature practiced by the Germans on the countries or peoples subject to their controls; states that it is this Government’s policy to undo the forced transfers and restitute identifiable property to the victims of Nazi persecution wrongfully deprived of such property; and sets forth that the policy of the Executive, with respect to claims asserted in the United States for restitution of such property, is to relieve American courts from any restraint upon the exercise of their jurisdiction to pass upon the validity of the acts of Nazi officials.”

When the case came before us again, we stated that “[i]n view of this supervening expression of Executive Policy, we amend our mandate in this case by striking out all restraints based on the inability of the court to pass on acts of officials in Germany during the period in question.” 210 F.2d 375, 376 (2d Cir. 1954).

First National City argues that *Bernstein* requires that we change our prior decision in the instant case, as we did there, to conform with the State Department suggestions. It contends that since the Executive has now written a "Bernstein letter" exercising its prerogative in the area of foreign policy and suggesting that the act of state doctrine is inappropriate in this case, the policies underlying that doctrine, to which the Supreme Court gave crucial weight in *Sabbatino*, are not present here. According to First National City, judicial resolution of the issue raised by this claim would involve no encroachment on the Executive's prerogatives in the area of foreign affairs; there would be no invasion of the foreign government's sovereignty since Cuba itself sought the process of United States law; and there would be no burden on international trade, nor risk to innocent purchasers, since the sole question is whether one party has defenses that fairly curtail the recovery sought by the other party. Hence, says First National City, this Court should not apply the act of state doctrine here.

First National City contends further that without the bar of the act of state doctrine, we can and must hold in its favor—that it is entitled to set off against Banco Nacional's claim for relief such amount as may be due and owing it from the Cuban government as compensation for its confiscated Cuban property. Its argument in this regard runs as follows: In *Sabbatino*, we held that Cuba's seizures of property of United States nationals pursuant to Cuban Law No. 851 were in violation of international law. *Banco Nacional de Cuba v. Sabbatino*, 307 F.2d 845 (2d Cir. 1962). That substantive determination was not questioned by the Supreme Court in reversing us in *Sabbatino*, for the Supreme Court decided only that the Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign. When this restraint was removed by the Hickenlooper Amendment, this Court was "unable to find any convincing reason, based on argument or new authority, for altering our holding in the original

appeal," 383 F.2d at 183; and so we reaffirmed our previous holding that Cuban taking was invalid under international law. *Banco Nacional v. Farr*, 383 F.2d 166 (2d Cir.), cert. denied, 390 U.S. 956 (1967). When the instant case came here, we felt that the restraint on an examination of validity, recognized in the Supreme Court's decision in *Sabbatino*, precluded the result we had reached in *Farr* because the Hickenlooper Amendment did not apply. Now, says First National City, the situation is altered by the subsequent expression of views by the State Department; and hence, in conformity with our decision in *Bernstein*, we should respond by following our decision on the merits in *Farr*, with respect to the same Cuban law.

We disagree. First National City's arguments are based wholly on the assumption that the so-called *Bernstein* exception to the act of state doctrine applies here since the State Department has written a letter. We feel that that assumption is erroneous. *Bernstein* arose out of a unique set of circumstances calling for special treatment, and hence should be narrowly construed and, insofar as is possible, limited to its facts.

As shown above, the facts in *Bernstein* were most unusual, to say the least, and bear no resemblance to those in the instant case. The acts of state there were performed by a German government with which this country had gone to war and which was no longer in existence at the time of the State Department's letter. Here, on the other hand, we have never been at war with Castro's Cuban government, and that government is both extant and recognized by the United States. Again, unlike the situation here, the State Department's letter in *Bernstein* was written during the aftermath of a great world war; and the Nazi government's actions, such as those of which *Bernstein* complained, had been condemned throughout the world as crimes against humanity. Furthermore, the letter in *Bernstein* went so far as to indicate that it was the affirmative policy of our govern-



ment to restitute identifiable property to *all* those victimized by the Nazi confiscation, not merely, as the letter indicates in this case, to those who assert counterclaims or setoffs.

The Executive itself seems to have recognized the uniqueness of *Bernstein*, for the Solicitor General's Brief as *Amicus Curiae* before the Supreme Court in the *Sabbatino* case states:

"The circumstances leading to the State Department's letter in the *Bernstein* case were of course most unusual. The governmental acts there were part of a monstrous program of crimes against humanity; the acts had been condemned by an international tribunal after a cataclysmic world war which was caused, at least in part, by acts such as those involved in the litigation, and the German State no longer existed at the time of State Department's letter. Moreover, the principle of payment of reparations by the successor German government had already been imposed, at the time of the '*Bernstein* letter,' upon the successor government, so that there was no chance that a suspension of the act of state doctrine would affect the negotiation of the reparations settlement."

There is still another important distinction between *Bernstein* and the case at bar. In *Bernstein*, as should be clear, the balance of equities was almost entirely on the side of the party opposing application of the act of state doctrine, the plaintiff, whereas here, as we found in our prior decision in this case, the contrary is true, since First National City is seeking a windfall at the expense of other creditors. 431 F.2d, at 404 n. 18.

In actual practice, as the Solicitor General's *Amicus* Brief in *Sabbatino* also recognizes, the *Bernstein* exception has been an exceedingly narrow one. Prior to the present case, a "Bernstein letter" has been issued only once—in the *Bernstein* case itself. Moreover, the case has never been

followed successfully; it has been relied upon only twice, and in both of those instances, by lower courts whose decisions were subsequently reversed. *Banco Nacional de Cuba v. Sabbatino*, 307 F.2d 845, 857-58 (2d Cir. 1962), *rev'd*, 376 U.S. 398 (1964); *Kane v. National Institute of Agrarian Reform*, 18 Fla. Supp. 116 (Fla. Cir. Ct. 1961), *rev'd*, 153 So. 2d 40 (Fla. App. 1963).<sup>2</sup> The Supreme Court has never passed on the validity of the *Bernstein* exception; indeed, in *Sabbatino* it carefully avoided making any such determination. 376 U.S. at 420.

Furthermore, the Court in *Sabbatino* seemed to recognize one of the distinctions described above between a *Bernstein*-type case and a case such as the one at bar. In discussing when the act of state doctrine should be applied, the Court stated that "[t]he balance of relevant considerations may . . . be shifted if the government which perpetrated the challenged act of state is no longer in existence, as in the *Bernstein* case, for the political interest of this country may, as a result, be measurably altered. Therefore, . . . we decide only that the Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign government, extant and recognized by this country at the time of suit, in the absence of a treaty or other unambiguous agreement regarding controlling

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<sup>2</sup> The *Bernstein* case has, in a few other instances, been cited, but not in relevant situations. For example, in *Zwack v. Kraus Bros. & Co.*, 237 F.2d 255 (2d Cir. 1956) and *Republic of Iraq v. First National City Bank*, 241 F. Supp. 567 (S.D.N.Y. 1965), the case was cited, although no *Bernstein* letter had been filed and the issue in the cases involved property located in the United States and hence not subject to the Act of State doctrine. In a few other instances the *Bernstein* case has been mentioned in passing, merely as an exception to the act of state doctrine. *Banco Nacional v. Farr*, 243 F. Supp. 957 (D.C.N.Y. 1965); *Palicio v. Brush*, 256 F. Supp. 481 (D.C.N.Y. 1966); *Wyman v. United States*, 166 F. Supp. 766, 769 (Ct. Cl. 1958). In *Menendez Rodrigues v. Pan American Life Insurance Co.*, 311 F.2d 429 (5th Cir. 1962), the court treated the correspondence referred to in our decision in *Sabbatino*, as a *Bernstein* letter; but, as is noted above, our decision in *Sabbatino* was reversed by the Supreme Court.

legal principles, even if the complaint alleges that the taking violates customary international law." 376 U.S. at 428. It is clear that the confiscation of First National City's property in Cuba by the extant and recognized Cuban government comes within this holding, and the thrust of the entire decision in *Sabbatino* is contrary to recognizing exceptions to the act of state doctrine in such cases.

For these reasons, we conclude that *Bernstein* is best left narrowly limited to its own peculiar facts and that, despite the State Department's letter of November 17, 1970, the exception to the act of state doctrine created by that case is inapplicable to the case at bar. Rather, we still find persuasive those cogent policy reasons for applying the doctrine which were articulated by Mr. Justice Harlan in *Sabbatino* and set forth in our prior opinion at 431 F.2d 397-99. Since we hold that the State Department's letter here does not bring this case within the narrow *Bernstein* exception, it is plain that that letter does not relieve us from applying the act of state doctrine to bar examination of the validity of the Cuban expropriation of First National City's property there.

Accordingly, we adhere to our prior decision and reverse and remand this case for further proceedings consistent with that decision and this.

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## APPENDIX

[See Appendix C-2, *Infra*]

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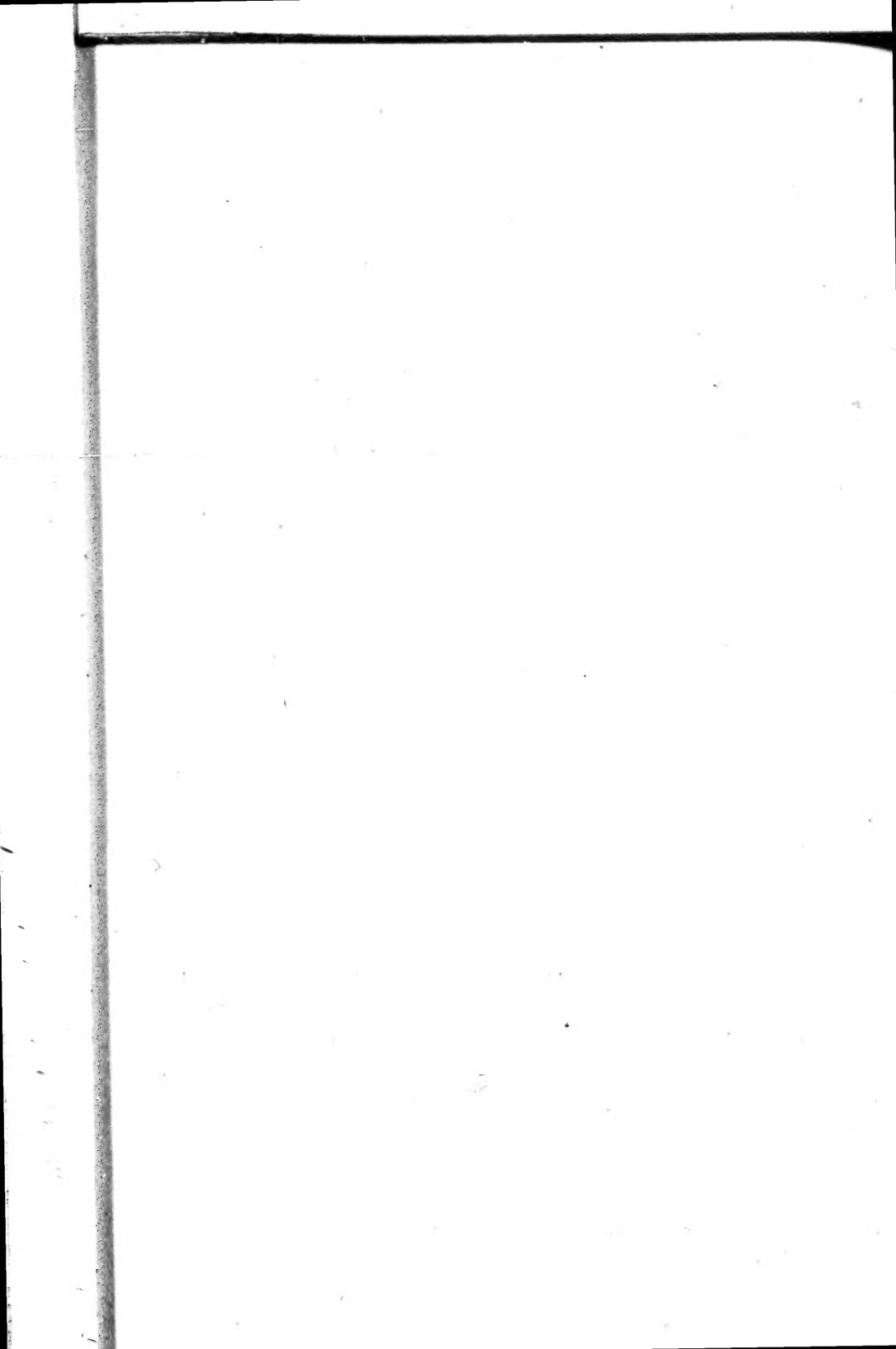
HAYS, *Circuit Judge* (dissenting):

By refusing to apply the exception to the act of state doctrine announced by this court in the third *Bernstein* case, *Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij*, 210 F.2d 375 (2d Cir. 1954), the majority is engaging in precisely the kind of judgment which the act of state doctrine has removed from judicial determination.

The majority's attempt to distinguish *Bernstein* shows a misapprehension of the basis upon which the *Bernstein* exception was formulated. *Bernstein* was a per curiam opinion in which this court set forth part of the text of a State Department letter. The court, making no independent evaluation of the letter itself, then stated that "[i]n view of this supervening expression of Executive Policy, we amend our mandate in this case by striking out all restraints based on the inability of the court to pass on acts of officials in Germany during the period in question." *Id.* at 376. Considerations such as the acts of the Nazi government, the fact that we were at war with the government in question, and the fact that that government no longer existed, all used by the majority to distinguish *Bernstein*, were set forth not by the court but by the State Department in its letter. Unless the majority wishes to overrule *Bernstein*, it must accept the *Banco Nacional* letter as an expression of Executive Policy and go no further. In *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 420 (1964), the Court held that there had been no expression of Executive Policy.

More fundamental than a mere lack of conformity with *Bernstein*, however, is the fact that the majority, by applying the act of state doctrine after an independent evaluation of the merits of the State Department's decision, is usurping the same executive prerogative which it is the function of that doctrine to preserve. The recognition of this conflict is the very reason for the *Bernstein* exception. The fundamental premise behind the act of state doctrine is that "[t]he conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative—the political—Departments of the Government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision." *Oetjen v. Central Leather Co.*, 246 U.S. 297, 302 (1918). It is not the function of the courts to choose between competing foreign policy considerations and conclude that

Nazi Germany is "bad" and that Cuba is "good." The attitude of the United States toward foreign powers must be left, as in *Bernstein*, to the decision of the other branches of government. As the Court said in *Sabbatino*, in discussing the related issue of a judicial determination of the right of a foreign country to sue in our courts, "[t]his Court would hardly be competent to undertake assessments of varying degrees of friendliness or its absence. . . ." *Banco Nacional de Cuba v. Sabbatino*, *supra* at 410. The majority has undertaken just such an assessment and, in doing so, ignores both the exception to the act of state doctrine in *Bernstein*, and the fundamental purpose of the doctrine itself. I must dissent from what I consider to be a deviation from our judicial function.



**APPENDIX B**

**Order, Dated and Entered January 25, 1971**

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**Supreme Court of the United States**

**OCTOBER TERM, 1970**

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**No. 846**

**FIRST NATIONAL CITY BANK, *Petitioner***

***v.***

**BANCO NACIONAL DE CUBA**

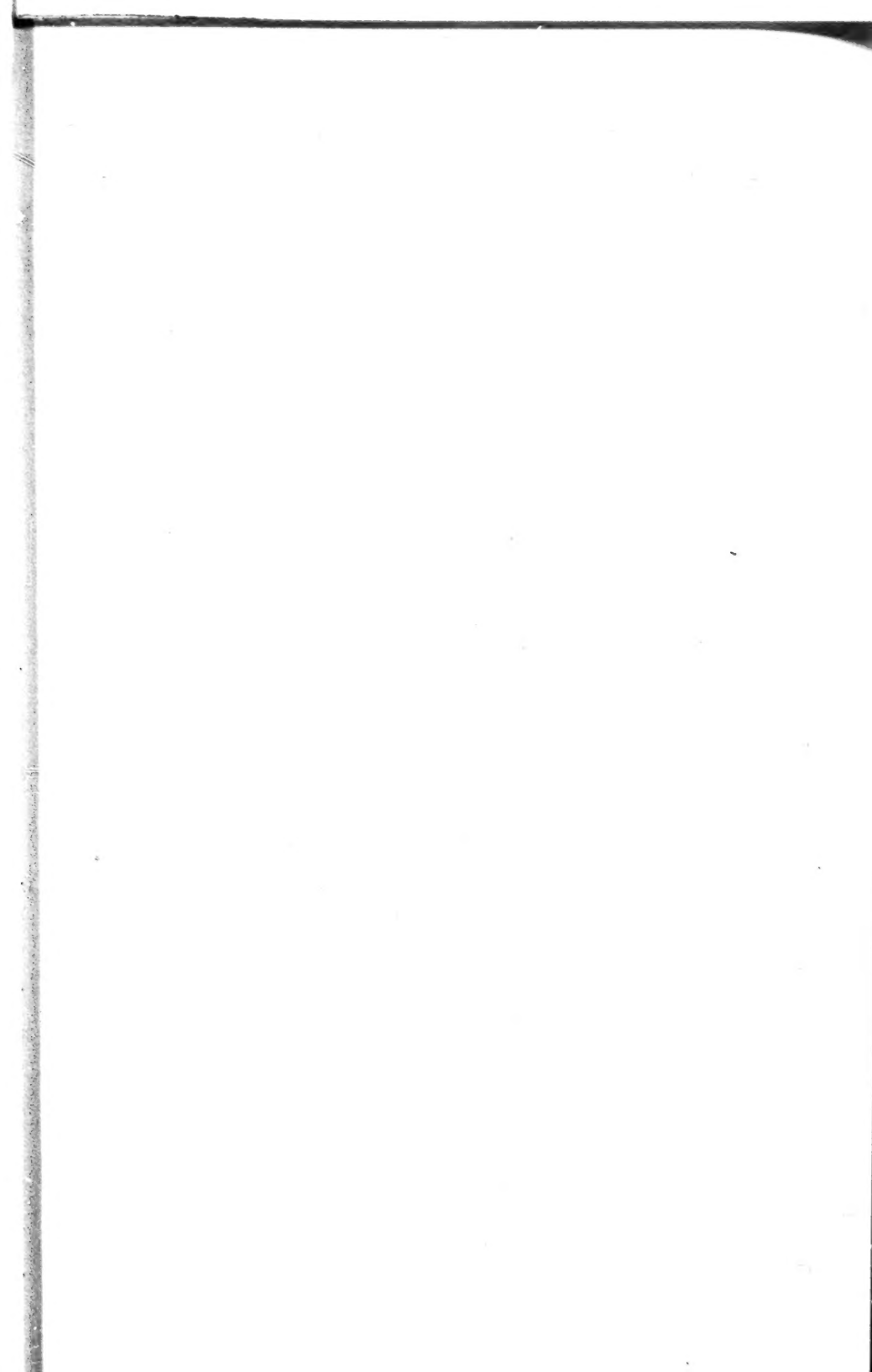
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**ORDER**

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The petition for a writ of certiorari is granted. The judgment of the Court of Appeals is vacated and the case is remanded to the Court of Appeals for reconsideration in light of the views of the Department of State expressed in its letter dated November 17, 1970, and transmitted to this Court by the Solicitor General. In taking this action, the Court is expressing no views on the merits of the case.





APPENDIX C

In the Supreme Court of the United States

OCTOBER TERM, 1970

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No. 846

FIRST NATIONAL CITY BANK, *Petitioner*

*v.*

BANCO NACIONAL DE CUBA

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MEMORANDUM

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At the request of the Department of State, I am transmitting herewith a letter signed by The Legal Adviser of the Department of State expressing certain views of that Department with respect to this case.

The Court may wish to remand this case to the court of appeals for that court's further consideration in light of these views of the Department of State.

Respectfully submitted.

ERWIN N. GRISWOLD,  
*Solicitor General*

NOVEMBER 1970.

## APPENDIX

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THE LEGAL ADVISER  
DEPARTMENT OF STATE  
WASHINGTON

NOVEMBER 17, 1970

Honorable E. Robert Seaver  
Clerk of the Court  
United States Supreme Court

Dear Mr. Seaver:

The case of *First National City Bank v. Banco Nacional de Cuba* is before the Supreme Court on petition for a writ of *certiorari*, No. 846 filed October 13, 1970. The case involves a claim by Banco Nacional for excess collateral it had pledged with City Bank to secure a loan and a counterclaim by City Bank, up to the amount claimed by Banco Nacional, based upon Cuba's expropriation, without compensation, of property of City Bank in Cuba in 1960.<sup>1</sup> The Court of Appeals for the Second Circuit held that the exception to the Act of State doctrine created by 22 U.S.C. § 2370(e)(2)<sup>2</sup> did not apply to City Bank's claim against

<sup>1</sup> The District Court determined that Banco Nacional and the Government of Cuba are one and the same for purposes of this litigation.

<sup>2</sup> "(2) Notwithstanding any other provision of law, no court in the United States shall decline on the ground of the federal act of state doctrine to make a determination on the merits giving effect to the principles of international law in a case in which a claim or title or other right to property is asserted by any party including a foreign state (or a party claiming through such state) based upon (or traced through) a confiscation or other taking after January 1, 1959, by an act of that state in violation of the principles of international law, including the principles of compensation and the other standards set out in this subsection: *Provided*, That this subparagraph shall not be

Cuba and that the Act of State doctrine, as expressed by the Supreme Court in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964), barred adjudication of City Bank's counterclaim.

The Department of State believes this second holding involves matters of importance to the foreign policy interests of the United States and requests that our views be conveyed to the Supreme Court.<sup>3</sup>

The Executive's role in suggesting that the act of state doctrine should not be applied with respect to a certain case or class of cases has been recognized both by the Department of State and in court decisions. This role, the so-called *Bernstein* exception to the act of state doctrine as applied by United States courts, was first clearly established in *Bernstein v. N.V. Nederlandsche Amerikaansche, Etc.*, 210 F.2d 375 (2nd Cir. 1954), where the court reversed its earlier holding, 173 F.2d 71 (2nd Cir. 1949), that the act of state doctrine precluded the court's adjudication of the validity of certain acts of the (Nazi) German Government. The basis for this reversal was a statement by Jack B. Tate, Acting Legal Adviser, Department of State, indicating that

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applicable (1) in any case in which an act of a foreign state is not contrary to international law or with respect to a claim of title or other right to property acquired pursuant to an irrevocable letter of credit of not more than 180 days duration issued in good faith prior to the time of the confiscation or other taking, or (2) in any case with respect to which the President determines that application of the act of state doctrine is required in that particular case by the foreign policy interests of the United States and a suggestion to this effect is filed on his behalf in that case with the court." (Foreign Assistance Act of 1965, Sec. 620(e)(2), 22 U.S.C. §2370(e)(2)).

<sup>3</sup> We regret that our views could not have been brought to the attention of the lower courts. Unfortunately, it was only after the not-yet-published opinion of the Second Circuit Court of Appeals was handed down that the question of the appropriateness of State Department action arose, since it did not become clear until that time that the *Sabbatino* Amendment would be considered inapplicable. No formal request for a statement by the Department was made in this case until October 14, 1970, one day after the petition for writ of *certiorari* was filed.

"The policy of the Executive, with respect to claims asserted in the United States for restitution of such property (or compensation in lieu thereof) lost through force, coercion or duress as a result of Nazi persecution in Germany, is to relieve American courts from any restraint upon the exercise of their jurisdiction to pass upon the validity of the acts of Nazi officials."

210 F.2d at 376. Thus the Executive had indicated that the act of state doctrine need not be applied in a certain class of cases; the applicability of the statement was not limited to the *Bernstein* case.

In *Banco Nacional de Cuba v. Sabbatino*, *supra*, the Supreme Court held that the act of state doctrine precluded the examination of the validity of the act of a foreign sovereign within its own territory, even where that act was allegedly a violation of international law. 376 U.S. at 436-37. The ruling was based on the Court's recognition of the Executive's prerogatives in the area of foreign affairs; it found the act of state doctrine "arising out of the basic relationships between branches of government in a separation of powers." *Id.* at 423. However, the Court specifically avoided ruling on the validity of the *Bernstein* exception. *Id.* at 436.

While the Department of State in the past has generally supported the applicability of the act of state doctrine, it has never argued or implied that there should be no exceptions to the doctrine. In its *Sabbatino* brief, for example, it did not argue for or against the *Bernstein* principle; rather it assumed that judicial consideration of an act of state would be permissible when the Executive so indicated, and argued simply that the exchange of letters relied on by the lower courts in *Sabbatino* constituted "no such expression in this case." Brief of the United States, page 11.

Recent events, in our view, make appropriate a determination by the Department of State that the act of state

doctrine need not be applied when it is raised to bar adjudication of a counterclaim or setoff when (a) the foreign state's claim arises from a relationship between the parties existing when the act of state occurred; (b) the amount of the relief to be granted is limited to the amount of the foreign state's claim; and (c) the foreign policy interests of the United States do not require application of the doctrine.

The 1960's have seen a great increase in expropriations by foreign governments of property belonging to United States citizens. Many corporations whose properties are expropriated, financial institutions for example, are vulnerable to suits in our courts by foreign governments as plaintiff, for the purpose of recovering deposits or sums owed them in the United States without taking into account the institutions' counterclaims for their assets expropriated in the foreign country.

The basic considerations of fairness and equity suggesting that the act of state doctrine not be applied in this class of cases, unless the foreign policy interests of the United States so require in a particular case, were reflected in *National City Bank v. Republic of China*, 348 U.S. 356 (1956), in which the Supreme Court held that the protection of sovereign immunity is waived when a foreign sovereign enters a U.S. court as plaintiff. While the Court did not deal with the act of state doctrine, the basic premise of that case—that a sovereign entering court as plaintiff opens itself to counterclaims, up to the amount of the original claim, which could be brought against it by that defendant were the sovereign an ordinary plaintiff—is applicable by analogy to the situation presented in the present case.

In this case, the Cuban government's claim arose from a banking relationship with the defendant existing at the time the act of state—expropriation of defendant's Cuban property—occurred, and defendant's counterclaim is limited to the amount of the Cuban government's claim. We find, more-

over, that the foreign policy interests of the United States do not require the application of the act of state doctrine to bar adjudication of the validity of a defendant's counterclaim or set-off against the Government of Cuba in these circumstances.

The Department of State believes that the act of state doctrine should not be applied to bar consideration of a defendant's counterclaim or set-off against the Government of Cuba in this or like cases.

Sincerely yours,

JOHN R. STEVENSON.



**APPENDIX D**

**Opinion, Dated July 16, 1970**

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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Nos. 480 and 481—September Term, 1969.

(Argued March 23, 1970                      Decided July 16, 1970.)

Docket Nos. 32533 and 33864

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BANCO NACIONAL DE CUBA,

*Appellant,*

*v.*

THE FIRST NATIONAL CITY BANK OF NEW YORK,

*Appellee.*

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Before :

LUMBARD, *Chief Judge,*

HAYS, *Circuit Judge,* and BLUMENFELD, *District Judge.\**

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Appeal from an order of the United States District Court for the Southern District of New York, Frederick vanP. Bryan, J., granting defendant-appellee's motion for summary judgment on its counterclaim against plaintiff-appellant. Reversed and remanded with directions.

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VICTOR RABINOWITZ, New York, N. Y. (Rabinowitz, Boudin & Standard, Leonard B. Boudin, and Kristin Booth Glen, on the brief),  
*for appellant.*

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\* Sitting by designation.

HENRY HARFIELD, New York, N. Y. (Shearman & Sterling, Wm. Harvey Reeves, and John J. Madden, Jr., on the brief), *for appellee.*

WALTER J. NEYLON, New York, N. Y., on the brief, *for Alicia Ruiz Martinez, Sr., et al., intervenors.*

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LUMBARD, *Chief Judge:*

Plaintiff-appellant Banco Nacional de Cuba appeals from an order of the District Court for the Southern District of New York which granted summary judgment to defendant-appellee First National City Bank of New York (First National City) on Banco Nacional's two causes of action. Appellant has abandoned the second cause of action on this appeal, and thus only the first cause of action, which is based on the following facts, is before us on this appeal. First National City, when the Castro government of Cuba expropriated its properties there, forthwith sold collateral securing a loan it had made to Banco Nacional prior to the change in Cuba's government. The effect of Judge Bryan's order was to allow First National City to retain, as an offset against the value of its expropriated properties, the amount by which the proceeds from the sale of the collateral exceeded the amount then owing on the loan. We hold that allowing such an offset was error. The so-called Hickenlooper Amendment does not give to a lender such as First National City the right to apply assets under its control to recoup losses it has suffered by expropriation of its properties in Cuba. Accordingly, we reverse and remand to the district court for a factual finding as to the amount of the excess. Once this factual determination is made, we direct entry of summary judgment in favor of Banco Nacional on its first cause of action.

On July 8, 1958, First National City made a fifteen million dollar secured loan to Banco de Desarrollo Economico y Social (Bandes), a corporate agency of the gov-

ernment of the Republic of Cuba. Collateral for the loan was pledged by Banco Nacional de Cuba (Banco Nacional) and another Cuban government agency, Fondo de Estabilizacion de la Moneda (Fondo); this security was held in New York and consisted of bonds of the United States government and obligations of the International Bank of Reconstruction and Development.

The Castro forces seized control of the government of Cuba on January 1, 1959. Thereafter, on July 8, 1959, First National City renewed the fifteen million dollar loan to Banderas for another year. During the course of the ensuing year, two Cuban laws went into effect which resulted in the dissolution of Banderas and the succession by Banco Nacional to many of its rights and obligations, including the obligation to repay the fifteen million dollars, plus interest, to First National City. The Republic of Cuba also guaranteed that the loan would be repaid.<sup>1</sup>

First National City and Banco Nacional renegotiated the loan for the second time on July 7, 1960. Banco Nacional repaid one-third of the loan—five million dollars—and First National City released approximately one-third of the collateral. At Banco Nacional's request, First National City agreed not to demand repayment of the ten million dollar balance for one year.

On September 16, 1960, the Cuban militia occupied the eleven First National City branch offices in Cuba. Executive Power Resolution No. 2, issued by the Castro government the following day, formally confirmed that the branches had in fact been nationalized.<sup>2</sup>

<sup>1</sup> The district court cited these laws as Cuban Law No. 730, February 16, 1960, and Cuban Law No. 847, June 30, 1960.

<sup>2</sup> Executive Power Resolution No. 2 was issued pursuant to Cuban Law No. 851, July 6, 1960. See *Banco Nacional de Cuba v. Sabbatino*, 307 F.2d 845, 849, 861-2 (2d Cir. 1962). Executive Power Resolution No. 2 is set out in the opinion of the district court, 270 F. Supp. at 1009-1010, note 6.

First National City retaliated almost immediately. On September 20, 1960, it notified Banco Nacional that it had closed Banco Nacional's accounts as of September 17 and that it was claiming the amounts on deposit therein as an offset against the nationalization of its properties in Cuba.<sup>3</sup> What is more important to the present appeal, on September 21 and 22, 1960, First National City sold the collateral held in New York as security on the ten million dollar loan. First National City received from that sale an amount—conceded to be at least \$11,892,448 and perhaps as much as \$12,412,000—which was substantially in excess of that required to discharge the ten million dollar principal sum and the interest thereon at the annual rate of 4 per cent for the period July 8, 1960 through the time of the sale.

## II.

Banco Nacional instituted suit in November, 1960, against First National City to recover the excess realized on the sale of the collateral held as security for the loan. Its complaint also set forth a second cause of action for recovery of the deposits on the Cuban banks which First National City had retained. As Judge Bryan described it, First National City's answer raised "a series of defenses, set-offs and counterclaims based principally on the confiscation of First National City's Cuban branches." 270 F. Supp. at 1005. Both parties moved for summary judgment on both causes of action and on the counterclaims.

As to the second cause of action, Judge Bryan granted First National City's motion for summary judgment. Banco Nacional filed a notice of appeal from that portion of his

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<sup>3</sup> What had happened was that a number of private Cuban banks with deposits in First National City were nationalized pursuant to Cuban Law No. 891 in October 1960, and the confiscation decree declared that Banco Nacional was to have full title to the property of those banks. Thus, First National City, in notifying Banco Nacional, referred to the accounts as Banco Nacional's.

order, but is not pressing that appeal at this time.<sup>4</sup> In dealing with the first cause of action, Judge Bryan denied Banco Nacional's motion for summary judgment on its claim and on First National City's counterclaim. However, as to defendant First National City's motion for summary judgment on the first cause of action and the counterclaim, Judge Bryan ruled:

Defendant's motion for summary judgment on the first claim is denied since there are triable issues of fact and law with respect to the amount of defendant's set-off. However, I hold that defendant is entitled to set-off as against [Banco Nacional's] first claim for relief any amounts due and owing to it from the Cuban Government by reason of the confiscation of First National City's Cuban properties.

270 F. Supp. at 1011.

It is this latter holding that is before us on this appeal. After Judge Bryan's order was filed, the parties entered into a stipulation providing that the value of First National City's property which had been confiscated in Cuba exceeds any amount which Banco Nacional could be awarded

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<sup>4</sup> We only observe that Judge Bryan's resolution of this issue was in compliance with the decision of this court in *Republic of Iraq v. First National City Bank*, 353 F.2d 47 (2d Cir. 1965), cert. den., 382 U.S. 1027 (1960). We also note that the holding that the Cuban expropriation decrees are not entitled to extraterritorial enforcement in United States courts as to property located within the United States is distinct from the question whether the act of state doctrine — absent the Hickenlooper Amendment — bars an American court from inquiry into the validity of expropriations of American property within the territory of the expropriated nation.

On this appeal, certain intervenors point out that they claim some of these deposits. The court below, in granting summary judgment to First National City on Banco Nacional's second cause of action, did not reach these claims, which we assume will be litigated below at some time.

on its first cause of action to recover from First National City the excess amount realized on the sale of the collateral.<sup>5</sup>

### III.

First National City claims that it is entitled to retain the excess amount realized on the foreclosure of the collateral as a set-off because the Cuban government confiscated its branch banks without providing adequate compensation, and that this act was a violation of international law. Judge Bryan properly observed that under the United States Supreme Court's decision in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964), "inquiry into the legality *vel non* of the expropriations here involved would be foreclosed by the act of state doctrine which forbids the courts of one country from sitting 'in judgment of the acts of the government of another, within its own territory.' " 270 F. Supp. at 1007. However, Judge Bryan then concluded that the *Sabbatino* decision had been legislatively overruled "for all practical purposes," by the Hickenlooper Amendment to the Foreign Assistance Act of 1964, 22 USC. § 2370(e)(2), as amended, 79 Stat. 658-59 (Sept. 6, 1965). He also noted that the Hickenlooper Amendment had been held constitutional in the Southern District of New York in the sequel to the *Sabbatino* litigation, *Banco Nacional de Cuba v. Farr*, 243 F. Supp. 957 (S.D.N.Y. 1965); we add that the district court decision in *Farr* was affirmed in a lengthy opinion by Judge Waterman, 383 F.2d 166 (2d Cir. 1967), and that Banco Nacional's petition for a writ of certiorari in that case was denied, 390 U.S. 1956 (1968).

Judge Bryan also held that the Hickenlooper Amendment directed him, regardless of the act of state doctrine, to determine "the merits in cases involving a confiscation after January 1, 1959, by an act of a foreign state 'in

<sup>5</sup> This stipulation was entered for purposes of this litigation, to avoid the necessity of a trial on the value of First National City's expropriated assets located in Cuba. See 270 F. Supp. at 1010-11.

violation of the principles of international law, including the principles of compensation.'” 270 F. Supp. at 1007. Proceeding to the merits, Judge Bryan held that the confiscation of First National City's branches did violate international law because adequate compensation was not provided and because the confiscation was a reprisal evincing discrimination against nationals of the United States. 270 F. Supp. at 1007-1010. In light of this, he concluded that First National City was entitled to a set-off against Banco Nacional's claim to recover the amount left from the sale of the collateral after deduction of the principal and interest due and owing.

On this appeal, Banco Nacional makes three principal arguments. First, it claims that the act by which the Cuban government confiscated First National City's branches in Cuba was an act of state, that the Hickenlooper amendment is not applicable to the facts in this case, and thus that the district court should have followed Mr. Justice Harlan's opinion for the Court in *Sabbatino* and not inquired into the validity of the Cuban expropriation under international law.<sup>6</sup> Second, Banco Nacional argues that the Hickenlooper Amendment is unconstitutional.<sup>7</sup> Third, Banco Nacional contends, with some justification, that summary judgment on First National City's counterclaim was improper because: (1) the counterclaim was invalid procedurally in that it was directed at the Republic of Cuba, which is not an “opposing party” in the present suit under Rule 13 of the

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<sup>6</sup> A sub-part of this argument is that, assuming the Hickenlooper Amendment applies to the facts of this case, Judge Bryan incorrectly applied international law in holding that the Cuban expropriations violated international law. However, appellant concedes that if this court holds the Amendment applicable to the case at bar, Judge Bryan's decision on this issue was in accordance with the decision of this court in *Banco Nacional v. Farr*, *supra*. 382 F.2d at 183-185; appellant states that it raises the issue only to preserve it for further appeal.

<sup>7</sup> Again, this issue was resolved against Banco Nacional in *Banco Nacional v. Farr*, *supra*, 383 F.2d at 178-183.



Federal Rules of Civil Procedure and the interpretations of that rule; or (2), assuming the counterclaim to be proper procedurally, Banco Nacional is not in fact liable for the obligations of the Republic of Cuba; or (3) because at the very least this latter question raised a triable issue of fact which was improperly resolved on a motion for summary judgment. Since we agree with Banco Nacional's first argument, we find it unnecessary to pass on the other contentions.

#### IV.

*Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964)<sup>8</sup> laid down a rule of federal law by which this court and all other courts are bound absent subsequent changes in the rule wrought by Congress or by the Supreme Court. In the course of his exhaustive opinion for the eight-member majority of the Court, Mr. Justice Harlan devoted considerable attention to the general problem of when domestic courts should decline to pass upon claims which draw into question the validity of the acts of foreign sovereign states. He observed that the

"continuing vitality [of the act of state doctrine] depends on its capacity to reflect the proper distribution of functions between the judicial and political branches of the Government on matters bearing upon foreign affairs. It should be apparent that the greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it, since the courts can then focus on the application of an agreed principle to circumstances of fact rather than on the sensitive task of establishing a principle not inconsistent with the national interest or with international justice. It is also evident that some aspects of international law touch much more sharply

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<sup>8</sup> Reversing *Banco Nacional de Cuba v. Sabbatino*, 307 F.2d 845 (2d Cir. 1962).

on national nerves than do others; the less important the implications of an issue are for our foreign policy, the weaker the justification for exclusivity in the political branches."

376 U.S. at 427-8.

From this general discussion, Mr. Justice Harlan's opinion proceeds to a specific consideration of the problem posed when the courts of one nation purport to examine the validity under international law of another nation's expropriation of the property of foreign nationals. Examining the state of the international law on this question, the Court concluded that there was no extant definition of the limits of such power which could command anything approaching a substantial majority of informed opinion. *Id.* at 428. After canvassing some of the basic disagreements on the question,<sup>9</sup> the Court stated that "[i]t is difficult to imagine the courts of this country embarking on an adjudication in an area which touches more sensitively the practical and ideological goals of the various members of the community of nations." *Id.* at 430.

The Court's opinion also stressed that it is far wiser for the courts to defer to the Executive in the task of securing some form of compensation for citizens of the United States who have lost property through expropriation by a foreign state. The Executive can often achieve some form of general redress, whereas judicial determinations can have only an occasional impact.<sup>10</sup> Moreover, judicial

"decisions would, if the acts involved were declared invalid, often be likely to give offense to the expropriating country; since the concept of territorial sovereignty is so deep-seated, any state may resent the refusal of the courts of another sovereign to accord

<sup>9</sup> 376 U.S. at 429-430.

<sup>10</sup> See section VI, *infra*.

validity to acts within its territorial borders. Piecemeal dispositions of this sort involving the probability of affront to another state could seriously interfere with negotiations being carried on by the Executive Branch and might tender less favorable the terms of an agreement that could otherwise be reached. Relations with third countries which have engaged in similar expropriations would not be immune from effect."

*Id.* at 431-2. Mr. Justice Harlan also dismissed the argument that American courts should examine the validity of foreign expropriations because in doing so they would make an important contribution to the development of international law as based on "the sanguine proposition that the decisions of the courts of the world's major capital exporting country and principal exponent of the free enterprise system would be accepted as disinterested expressions of sound legal principle by those adhering to widely different ideologies." 376 U.S. at 434-5.

Accordingly, the Court held "that the Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign government, extant and recognized by this country at the time of suit, in the absence of a treaty or other unambiguous agreement regarding controlling legal principles, even if the complaint alleges that the taking violates customary international law." *Id.* at 428. There can be no doubt that the confiscation of First National City's branch offices in Cuba by the Cuban government was such a taking of property. As such it is an act of state the validity of which the Court has directed the Judicial Branch not to examine.

## V.

The analysis just presented would suffice to decide this appeal but for the enactment of the Hickenlooper Amendment by Congress. The amendment, sometimes described

during the Congressional debates as the "Sabbatino Amendment,"<sup>11</sup> was passed in 1964, shortly after the Supreme Court rendered its decision in *Sabbatino*, and that fact is important in interpreting the language Congress used. In pertinent part, the Hickenlooper Amendment now provides:

"(2) Notwithstanding any other provision of law, no court in the United States shall decline on the ground of the federal act of state doctrine to make a determination on the merits giving effect to the principles of international law in a case in which a claim of title or other right to property is asserted by any party including a foreign state (or a party claiming through such state) based upon (or traced through) a confiscation or other taking after January 1, 1959, by an act of that state in violation of the principles of international law, including the principles of compensation and the other standards set out in this subsection. . . ."

Judge Bryan held that the Hickenlooper Amendment overruled the *Sabbatino* decision "for all practical purposes" and that he was therefore required to disregard the act of state doctrine and to pass on the validity of the expropriations of First National City's branches in terms of international law. Banco Nacional takes the position that Judge Bryan's reading of the Hickenlooper Amendment is far too broad. We agree.

To understand the legislative history upon which Banco Nacional relies, it is necessary to sketch briefly the facts of *Sabbatino* itself. The case involved a shipment of Cuban sugar which was to have been purchased by an American commodity broker, Farr, Whitlock & Co., from the Cuban subsidiary of an American owned firm, C.A.V. Before the

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<sup>11</sup> See e.g., Hearings before the Senate Committee on Foreign Relations on S. 2659, S. 2660, S. 2662, and H.R. 11380, 88th Cong., 2d Sess. (1964) at 449; Hearings before the House Committee on Foreign Affairs on H.R. 7750, 89th Cong., 1st Sess. (1965).

shipment could leave Cuba, all of the C.A.V.'s assets in Cuba were expropriated. Thereafter, the Cuban government allowed the shipment of sugar to leave Cuba, but only after Farr, Whitlock had entered into contracts, identical to its earlier agreement with C.A.V., with Banco Para Comercio Exterior de Cuba (Banco Exterior), an instrumentality of the Cuban government. The ship carrying the sugar was then allowed to sail from Cuba to Morocco. Banco Exterior assigned the bills of lading to Banco Nacional, which in turn assigned them to Societe Generale, a French bank which acted as Banco Nacional's agent in New York, for presentation to Farr, Whitlock for payment. In some manner, Farr, Whitlock obtained possession of the bills of lading from Societe Generale without making payment upon presentation. The money which Farr, Whitlock was supposed to pay for the shipment was also claimed by C.A.V. Thus, the dispute over the right to the proceeds of the sale of the expropriated shipment of Cuban sugar was between Banco Nacional, which in the words of the Hickenlooper Amendment claimed "title or other right . . . based upon (or traced through) a confiscation," and C.A.V., an American-owned firm which had owned the sugar before the expropriation.

*Sabbatino* was handed down by the Supreme Court in March, 1964, and in April, 1964, Senator Hickenlooper proposed the initial version of a foreign aid bill amendment related to the case in the Foreign Relations Committee.<sup>12</sup> A Conference Committee rewrote the language in September, 1964, and the amended version was enacted on October

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<sup>12</sup> "No court in the United States shall decline on the ground of the federal act of state doctrine to make a determination on the merits, or to apply principles of international law including the principles of compensation and the other standards set out in this subsection, in a case in which an *act* of a foreign state occurring after January 1, 1959 is alleged to be contrary to international law, and effect shall not be given by the court in any such case to *acts* that are found to be in violation thereof." (S. Rep. No. 1188, Part I, 88th Cong., 2d Sess. [1964], p. 37; emphasis added.)

7, 1964, as section 301(d)(4) of the Foreign Assistance Act of 1964. Pub. L. 88-633, 78 Stat. 1009, 1013. It was changed slightly and re-enacted in its present form on September 6, 1965, as section 301(d)(2) of the Foreign Assistance Act of 1965. Pub. L. 89-171, 79 Stat. 653, 22 U.S.C. § 2370(e)(2).<sup>13</sup>

It is evident from the proceedings in Congress relating to the Hickenlooper Amendment that Congressmen and others were quite concerned about the problem peculiarly related to the facts of the *Sabbatino* case. At the time of the Congressional debates during 1964 and 1965, virtually all American-owned property in Cuba had been nationalized. Much of this property consisted of productive installations such as sugar plantations, fertilizer plants, mines, and oil production facilities. In light of this, when the Supreme Court in *Sabbatino* issued a ruling which would apparently permit Banco Nacional to prevail over an American-owned firm in securing the proceeds of the sale of a shipment of expropriated sugar to an American commodity broker, the phrase "thieve's market for expropriated property" came into vogue. In explaining his proposal in an August, 1964, letter to the Washington Post, Senator Hickenlooper used the term "thieve's market," and explained further that the Amendment's purpose was to require American courts to apply international law "whenever expropriated property comes within the territorial jurisdiction of the United States." 110 Cong. Rec. 19548. At another time, he said "Basically the amendment is designed to assure that the private litigant is granted his day in court." 110 Cong. Rec. 18936. The Senator further explained:

"[The amendment] will discourage foreign expropriation by making sure that the United States cannot

<sup>13</sup> For a discussion of these changes see *Banco Nacional v. Farr*, *supra*, 383 F.2d at 171-2, and at 171, note 5.

become a 'thieve's market' for the product of foreign expropriations.

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One of the principal reasons for the proposed amendment is that it will serve notice that foreign states taking action against U.S. investment in violation of international law cannot market the product of their expropriation in the United States free from litigation."

110 Cong. Rec. 19555, 19559 (1964). See also *id.* 19548, 19557.

When the Conference Committee reported the Amendment to the House of Representatives on October 2, 1964, Congressman Adair, its sponsor in the House, gave this explanation of its purpose:

"It insures that however the case may arise or the act of state doctrine be invoked, a party who had suffered an expropriation in violation [of international law] *may bring suit to assert his claim to the expropriated property if there is an attempt to market it in the United States* or can resist a suit by the expropriating government to seize the property."

110 Cong. Rec. 23680 (1964) (emphasis added). Senator Hickenlooper described the provision in virtually identical terms in the Senate the following day. See 110 Cong. Rec. 24076-7 (1964).

The Hickenlooper Amendment was further considered in the 89th Congress during 1965, particularly in hearings held by the House Committee on Foreign Affairs on its reenactment. The first witness at these hearings was Professor Cecil Olmstead, one of the original authors of the Hickenlooper Amendment, who represented the Rule of Law Committee—formed by a group of American companies which had suffered expropriations—in its support



for the Amendment. He first discussed *Sabbatino*, describing its effect as follows:

"... [I]f the former American owners of property expropriated abroad seek to recover that property when it turns up within the United States they are denied any kind of recourse to U.S. courts, both State and Federal, even in cases in which the expropriation is uncompensated. . . . Specifically, this means that the fruits of such illegal expropriation could be marketed with impunity in the United States."

Hearings before the House Committee on Foreign Affairs on H.R. 7750, 89th Cong., 1st Sess. (1965), 578. See also *Id.* 579, 591, 592, 598-599, 601, 604-605, 612-615.

During Professor Olmstead's testimony, an instructive colloquy took place between Olmstead and Congressman Fraser, a member of the Committee. Mr. Fraser was interested in determining how broad the Amendment was. He asked:

"For example, supposing that country X expropriates some property and doesn't compensate for it and then a property belonging to the foreign state comes into the hands of an American citizen within this country so that they bring an action, they attach the property and bring an action in the U.S. courts alleging that this government has wronged them by expropriating their property, but the property they have attached is not the property that was expropriated, nevertheless they make the claim they are entitled to compensation and the defense, I assume, by the country involved is that they had a right to expropriate.

Does that situation come within the language of your amendment?

Mr. Olmstead: No, sir; that would not come within it. Our amendment has no provision in its scope to

apply to property other than that actually expropriated by the foreign country itself."

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Mr. Fraser: You are saying it would be limited solely to situations where you actually—where what [was] at issue was the title of the [expropriated] property, that is the major issue?

Mr. Olmstead: Yes."

There followed a page of discussion about ore or oil from an expropriated mine or well coming back into this country, and Professor Olmstead then concluded: "Of course this amendment will only operate when *some proceeds of the illegal expropriation turn up in the United States*," *id.* at 607-608 (emphasis added).

Attorney General Katzenbach, who testified before the same Committee the day after Professor Olmstead, took the same view. In his opening remarks in opposition to the Amendment he stated:

"What are we talking about in this amendment? We are talking about a very isolated, infrequent occurrence which is when American property that has been nationalized in some way or another finds its way back in the United States. That is very unlikely to occur. . . . It is generally an accident because the owner of that property, or the foreign government involved, is not going to bring that property into this country and is deterred from doing it by the fact that normally, if that property is bought into this country, the assets from it are going to be frozen in an outstanding dispute with the foreign country."

House hearings, *supra*, at 1235. See also, *id.* 1236, 1237 (testimony of Mr. Katzenbach).

Congressman Gross, another member of the House Foreign Affairs Committee, urged that the Amendment be broadened to enable the owner of expropriated property to

seize Cuban property in the United States as an offset for the value of property seized by Cuba. See House Hearings, *supra*, at 1249; see also *id.*, at 1050. As appellant Banco Nacional points out, this is precisely the position First National City takes in this litigation. However, First National City has cited no legislative history, and we have found none, which indicates that Mr. Gross' suggestion was thought to have been adopted by Congress when it re-enacted the Hickenlooper Amendment.

Banco Nacional quotes the following colloquy between Mr. Katzenbach and Representative Gallagher of the House Foreign Affairs Committee as indicative of the legislators' and witnesses' understanding of the scope of the Amendment:

"Mr. Gallagher: This amendment merely applied to property that works its way back into the United States; correct?

Attorney General Katzenbach: Yes.

Mr. Gallagher: That it has no effect whatsoever on any property that continues to rest or vest in the country that made the seizure?

Attorney General Katzenbach: That is correct."

House hearings, *supra*, at 1247. See also colloquy between Mr. Katzenbach and members of the Committee, *id.* at 1245-1247; colloquy between Professor Henkin and Mr. Gallagher, *id.* at 1072; testimony of Professor Metzger, *id.* at 1025-1031; testimony of Professor McDougal, *id.* at 1043, 1050-1051; statement of the Committee on International Law of the Association of the Bar of the City of New York submitted to the House Foreign Affairs Committee in support of the Amendment, *id.* at 1316. See also Hearings before the Senate Committee on Foreign Relations on the Foreign Assistance Program, 89th Cong., 1st Sess. (1965), 728 (letter to Chairman Fulbright from George W. Ball); 730-760 (an appendix consisting of material submitted by

Senator Hickenlooper, much of it from the earlier House hearings).

Given all of this background, we can find no basis for holding that the present case is one "in which a claim of title or other right to property is asserted by [First National City] . . . based upon (or traced through) a confiscation or other taking . . . ." 22 U.S.C. § 2370(e)(2). To do so would stand the statute on end. If one fact is clear from the legislative history, it is that this language was designed to be invoked by American firms in order to afford them "a day in court"—and presumably a monetary recovery—when some other entity attempted to market the American firms' expropriated property and some aspect of such an attempted transaction took place in this country. We cannot believe that through the same language Congress intended to create a self-help seizure remedy for those few American firms fortunate enough to hold or have access to some assets of a foreign state at the time that state nationalizes American property.<sup>14</sup>

## VI.

Indeed, it seems to us that such an interpretation of the Hickenlooper Amendment would run counter to another important Congressional policy.

Through the provisions of Subchapter V of the International Claims Settlement Act of 1949, Pub. L. 88-666, 78 Stat. 1110, amended Oct. 19, 1965, Pub. L. 89-262, § 1, 79 Stat. 988; Nov. 6, 1966, Pub. L. 89-780, § 1, 80 Stat. 1365, 22 U.S.C. §§ 1643-1643k (1970 Supp.), on October 16, 1964, Congress provided for "the determination of the amount and validity of claims against the Government of Cuba . . . [arising] out of nationalization expropriation, intervention,

<sup>14</sup> See Henkin, Act of State Today: Recollections in Tranquility, 6 Col. J. of Transnational Law, 175, 184-5 (1967); see also *id.* 185, n. 40.

or other takings of . . . property of nationals of the United States . . . ." 22 U.S.C. § 1643 (1970 Supp.). Obviously, the expropriation of First National City's branches in Cuba gave rise to a claim of the sort which Congress intended to be submitted to the Foreign Claims Settlement Commission. See 22 U.S.C. § 1643b(a) (1970 Supp.).

On the other hand, Congress and the Executive Branch have also acted, pursuant to the Trading with the Enemy Act, 50 U.S.C. App. § 5 (1970 Supp.); Proc. 3447, 27 F.R. 1085, 3 C.F.R., 1959-1963 Comp., to block all Cuban assets present in this country as of July 8, 1963. See 31 C.F.R. §§ 515, et seq. (1970).<sup>15</sup> At present there is no provision in the federal statutes or regulations providing for vesting of the blocked Cuban assets—whether assets of the Cuban government or of Cuban nationals—in the government of the United States for sale and use by the Foreign Claims Settlement Commission to pay those who have submitted claims to the Commission based on expropriations by the Cuban government.<sup>16</sup>

<sup>15</sup> The report of the Treasury Department, Office of Foreign Assets Control, on the census of blocked Cuban assets, is reprinted in Housing Hearings, *supra*, at 1264. The report states, as reprinted at 1264, that the Cuban assets control regulations were adopted "under section 5(b) of the Trading with the Enemy Act of 1917, as amended, to implement the policy of an economic embargo of Cuba set forth in Proclamation No. 3447, which was issued by the President under section 620(a) of the Foreign Assistance Act of 1961, Public Law 87-195."

<sup>16</sup> In 1964, when Congress enacted subchapter V of the International Claims Settlement Act of 1949, relating to claims against Cuba, it included as section 511(b) a provision vesting the blocked assets of the Cuban government in the United States government and further providing that the proceeds of such assets of the Cuban government should be used to reimburse the United States government for the expense of operating the Foreign Claims Settlement Commission and the Department of the Treasury in processing claims against Cuba. Pub. L. 88-666, section 511(b), 78 Stat. 1113 (October 16, 1964). However, that section was repealed one year later, see Pub. L. 89-262, section 5, 79 Stat. 1988 (October 16, 1965). The report of the Senate Foreign Relations Committee states that "the committee

It is this system of claim submission and blocking of assets which First National City seeks to circumvent. Due to the Cuban expropriation of its branches, First National City felt justified in breaching whatever loan agreement it had entered with Banco Nacional on July 7, 1960, by prematurely foreclosing on the collateral held as security. It was fortunate for First National City that sale of the collateral brought more than enough money to cover the principal amount and interest then due on the loan. First National City was also fortunate in that they sold the security before Cuban assets were blocked in July, 1963. Had they waited, it seems clear, under 31 C.F.R. § 515.202 (1970), that any sale of the collateral put up by Banco Nacional as security on the loan in suit would have been impossible without a license from the Office of Foreign Assets Control of the Treasury Department. See 31 C.F.R. § 515.801 (1970). As matters now stand First National

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was persuaded by the following argument advanced by the Department of State:

'it is the Department's view that vesting and sale of Cuban property could set an unfortunate example for countries less dedicated than the United States to the preservation of rights. The Government of the United States, as a matter of policy, encourages the investment of American capital overseas and endeavors to protect such investments against nationalizations, expropriations, intervention, and taking. To vest and sell Cuban assets would place the Government of the United States in the position of doing what Castro has done. It could cause other governments to question the sincerity of the United States Government in insisting upon respect for property rights. The result could be a reduction, in an immeasurable but real degree, of one of the protections enjoyed by American-owned property around the world.'

Sen. R. No. 701, 89th Cong., 1st Sess., 2 U.S.C. Code Cong. & Admin. News p. 3583 (1965).

It seems to us that Congress' acceptance of the State Department's argument points up to some extent the wisdom of Mr. Justice Harlan's observation in *Sabbatino* that to permit American courts to pass on the validity of expropriations would have an effect on "[r]elations with third countries which have engaged in similar expropriations." 376 U.S. at 432.



City has recouped dollar-for-dollar on the loan transaction; by its position on this appeal, it seeks something more.

We do not believe that First National City has any special claim to the excess proceeds of the sale of the collateral. Any judgment rendered in favor of Banco Nacional on its first cause of action would, after deduction of attorney's fees, become a blocked Cuban asset.<sup>17</sup> Presumably, if other attempts at settlement of the claims fail, the blocked Cuban assets will eventually be vested in the United States government and the Foreign Claims Settlement Commission will begin compensation of the claimants. As part of the pool of assets available for compensation, such a judgment in favor of Banco Nacional would serve to provide at least partial compensation of all those claimants who suffered losses in the Cuban expropriations. See testimony of Attorney General Katzenbach, House Hearings, *supra*, at 1235-1236. No authority which First National City has cited in its brief establishes any right to a preference such as that which would result if the decision of the district court were to be affirmed. While Judge Bryan noted in a footnote that "[a]ny sum which First National City is permitted to set-off in this action will of course have to be

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<sup>17</sup> See Report of Treasury Department, Office of Foreign Assets Control, *Census of Blocked Cuban Assets*, *supra* note 15, reprinted in House Hearings, *supra*, at 1264.

First National City's judgment debt to Banco Nacional for the excess amount it holds would have to be reported to the Office of Foreign Assets Control on Form TFR-607 under any one of several classifications of "reportable property" specified on that form.

The report also states that the deadline for filing reports for the Office's census of blocked Cuban assets was March 15, 1964. However, the report notes that there are probably many people holding blocked assets who did not know of the deadline, and states "extensions of time for filing were granted when necessary." There is little question that an extension would be granted in a situation such as the present case, where lengthy, litigation to settle the dispute over entitlement to the excess funds carried the parties past the filing deadline.



taken into account by the United States Foreign Claims Settlement Commission in assessing claims filed by First National City," 270 F. Supp. at 1011, note 10, we observe that such a set-off against its total claims with the Commission would still allow First National City a dollar-for-dollar recoupment on a significant portion of its total claim for the value of its expropriated property—something which few, if any, other claimants are likely to receive.<sup>18</sup>

<sup>18</sup> We note from the affidavit of First National City Bank submitted below that its claims for expropriated property is relatively small, about three million dollars, as compared to some claims which must have been filed by American corporations with large industrial operations in Cuba.

The windfall First National City seeks can best be understood through a hypothetical example. Assume that there are twenty claimants who have filed with the Foreign Claims Settlement Commission pursuant to 22 U.S.C. § 1643 (Supp. 1970). Ten claimants, called "A" claimants, each have claims for fifteen million dollars; four claimants, called "B" claimants each claim five million dollars. The twentieth claimant is First National City Bank which, for purposes of this example, also seeks five million dollars. Further, assume that absent the sum in dispute in this case the total value of blocked Cuban assets held by the Office of Foreign Assets Controls is 20 million dollars.

If the claims are eventually allowed to vest against the fund and some sort of pro rata payment authorized, First National City Bank will do considerably better if it is permitted to retain the Cuban assets which fortuitously were in its reach, rather than if it had merely held the excess here in dispute so that in time it would have been blocked and become part of the fund.

Assume First National City has seized the collateral, sold it, and realized three million dollars over the amount owed with interest. If, as it seeks in this suit, it keeps the three million as a set-off against its claims against Cuba, the fund compromised of all blocked assets would still equal twenty million dollars. However, the claims against the fund would be reduced from 200 million to 197 million, since First National City would have to off-set the three million dollars against the five million dollars we have assumed it has claimed with the Foreign Claims Settlement Commission. See 22 U.S.C. § 1643 (Supp. 1970). On this basis, the pro rata share would be 10.9 cents on the dollar. The "A" claimants, seeking 15 million each, would each receive about 1.52 million; the "B" claimants, with claims for 5 million, would each take about .57 million. And First National City, with its claim

## VII.

Since there is a factual dispute, to the extent of more than \$500,000, between the parties as to the total amount realized from the sale of the collateral and as to the amount of interest properly deducted, which Judge Bryan was not called upon to resolve due to his disposition of the summary judgment motions, we remand to the district court for a determination of the exact amount of excess left after the principal sum and the interest due thereon is deducted from the proceeds of the sale of the security. When this determination is made, the district court is directed to grant Banco Nacional's motion for summary judgment on its first cause of action.

Reversed and remanded for further proceedings consistent with this opinion.

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reduced to 2 million, would receive about .24 million. But to this must be added the 3 million which it took directly, bringing its total recovery to 3.24 million.

In the second case, First National has not (or is not allowed to) take the 3 million for its own account; rather, it stays in Banco Nacional's name and in time becomes part of the fund. Now, the fund has 23 million, while the claims are 200 million, since First National City has nothing to off-set against its initial claim of 5 million. Here, the pro rata share would be about 11.5 cents on the dollar. The "A" claimants would receive about 1.73 million each, while the "B" claimants—including First National City—would take about .575 million each.

As can be seen, by resorting to self-help and avoiding the Congressional scheme for orderly settlement of these claims, First National City stands to profit considerably. Under our hypothetical figures, the difference is between 3.24 million and .575 million dollars. The windfall of course is not at the expense of Cuba, but rather comes out of the shares of all other American nationals who have lost property by the Cuban expropriation.



## APPENDIX E

Opinion and Order, Dated July 20, 1970  
and Entered July 21, 1970

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UNITED STATES DISTRICT COURT

S.D., NEW YORK

July 20, 1967

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BANCO NACIONAL DE CUBA,

*Plaintiff,*

*v.*

THE FIRST NATIONAL CITY BANK OF NEW YORK,  
*Defendant.*

No. 60 Civ. 4664.

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Shearman & Sterling, New York City, for defendant;  
Henry Harfield, Charles C. Parlin, Jr., William Harvey  
Reeves, New York City, of counsel.

Rabinowitz & Boudin, New York City, for plaintiff;  
Victor Rabinowitz, Mary M. Kaufman, Henry Winestine,  
Eleanor Fischer, New York City, of counsel.

### Opinion

FREDERICK VAN PELT BRYAN, *District Judge:*

This action by Banco Nacional of Cuba (Banco Nacional), the financial agent of the Government of Cuba, against The First National City Bank of New York (First National City) is one of the numerous cases before me raising issues arising out of confiscations of American-owned property in Cuba by the Castro Government.

The amended complaint alleges two claims for relief, the first for the excess realized by First National City on the

sale of collateral held as security for a loan, and the second for deposits by nationalized Cuban banks in First National City in New York. The answer pleads a series of defenses, set-offs and counterclaims based principally on the confiscation of First National City's Cuban branches. First National City has now moved for summary judgment pursuant to Rule 56(a), F.R.C.P., and Banco Nacional has cross-moved for the same relief on the first claim and for judgment dismissing the counterclaims. Rule 56(b).

## I.

The facts giving rise to the first claim for relief are not in serious dispute. On July 8, 1958, First National City, a New York banking corporation doing business in New York and throughout the world, made a loan of fifteen million dollars to Banco de Desarrollo Economico y Social (Bandes), a governmental corporate agency of the Republic of Cuba. The loan was secured by United States Government bonds and obligations of the International Bank of Reconstruction and Development pledged to First National City by Fondo de Estabilizacion de La Moneda (Fondo), another Cuban governmental agency, and Banco Nacional. On January 1, 1959, the Castro Government took control of the Republic of Cuba. The fifteen million dollar loan to Bandes was renewed for another year on July 8, 1959. Thereafter by virtue of Cuban Law No. 730, February 16, 1960, and Law No. 847, June 30, 1960, Bandes was dissolved and Banco Nacional succeeded to the rights and obligations with which we are concerned in this action, including the obligation to repay the loan. The Republic of Cuba guaranteed repayment. On July 7, 1960, the terms of the loan were renegotiated for the last time. Banco Nacional repaid five million dollars, and requested and obtained an agreement from First National City to defer demand for the balance of ten million dollars for one year. A proportionate amount of collateral was then released.

September 16, 1960, however, marked the date of an irreparable breach of the relationship between these parties. On that day the Cuban militia seized all eleven of First National City's branches located in Cuba. On the following day the issuance of Executive Power Resolution No. 2 left no uncertainty as to the permanent nature of these confiscations; under the terms of the resolution the Cuban State was declared "subrogated" to all of First National City's rights, obligations, and liabilities.<sup>1</sup>

In the light of this turn of events First National City, on September 23, 1960, sold the collateral it held as security for the unpaid portion of the loan and applied the proceeds in payment of the principal obligation and accrued interest. Defendant concedes—and plaintiff for purposes of this motion does not deny—that the amount realized on the sale of collateral exceeded by \$1,810,880.51 the ten million dollars of unpaid principal and the \$65,000 interest then due.<sup>2</sup> The first claim for relief seeks judgment for the amount of the excess.

The answer of First National City to the first claim alleges in substance that the Republic of Cuba is the real party in interest in this action, that the Cuban government is indebted to the defendant in an amount exceeding the sum demanded in the amended complaint by reason of the confiscation of its Cuban property, and that therefore the defendant is entitled to set off this outstanding obligation as a complete defense to the claims asserted by Banco Nacional. First National City has also interposed an affirmative counterclaim for the amount of the excess, and seeks dismissal of plaintiff's claim with prejudice. Both parties recognize that this court on the present papers cannot determine the value of First National City's Cuban properties which have been confiscated. But apart from this issue of

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<sup>1</sup> See note 6, *infra*.

<sup>2</sup> The amount sought in the first count of the amended complaint was \$2,347,000.

fact the basic questions in this case are posed by the motions before me.

The ultimate legal issues on the first claim are clearly drawn. Banco Nacional strenuously contends that the affirmative counterclaim and the set-off by way of defense are barred, alternatively, by principles of sovereign immunity and the act of state doctrine. The dispositive question is simply whether defendant is precluded on those grounds from asserting—either affirmatively or by way of set-off as a complete defense—a claim for the value of its confiscated Cuban properties.

## II. *Sovereign Immunity*

There is no serious question that the Government of Cuba and Banco Nacional are one and the same for purposes of this litigation.<sup>3</sup> And as a general rule a state which initi-

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<sup>3</sup> Plaintiff at various times has argued that defendant's claim against the Cuban government cannot be asserted against Banco Nacional, an entirely separate entity. This position is, of course, flatly inconsistent with the sovereign immunity argument. Moreover, throughout the *Sabbatino* litigation it was recognized by every court concerned that Banco Nacional De Cuba was an instrumentality of the Cuban government. *Banco Nacional v. Sabbatino*, 193 F. Supp. 375 (S.D. N.Y. 1961), *aff'd*, 307 F.2d 845 (2d Cir. 1962), *rev'd*, 376 U.S. 398, 84 S. Ct. 923, 11 L. Ed. 2d 804 (1964). As Judge Weinfeld pointed out the complaint there alleged that plaintiff was a "public corporation wholly owned by the government." *Banco Nacional De Cuba v. Sabbatino*, 27 F.R.D. 255, 258 (S.D. N.Y. 1961). The present amended complaint alleges only that plaintiff "is a corporate body existing under \*\*\* the laws of the Republic of Cuba, authorized to administer the domestic and foreign credit operations of the Republic of Cuba as its agent and having its principal office in Havana, Cuba." But any doubts as to the organic relationship between plaintiff and the Cuban government are removed by an examination of the local laws defining the function and authority of Banco Nacional. Plaintiff alone has exclusive charge of directing the banking function of the state. Law No. 891, arts. 1, 2, 3, Oct. 14, 1960. And it is plaintiff who shall exercise "the monetary sovereignty of the Nation." Law No. 930, art. 1, Feb. 23, 1961. The Government of Cuba and Banco Nacional are indistinguishable entities for purposes of this lawsuit. Compare *Dexter & Carpenter, Inc. v. Kunglig Jarnvagsstyrelsen*, 43 F.2d 705 (2d Cir. 1930).



ates proceedings in a court of another sovereignty waives immunity from a counterclaim or set-off to the extent that it does not exceed the amount of the state's claims. ALI, Restatement (Second), Foreign Relations Law of the United States § 70(2)(a) (1965). This waiver extends to defensive counterclaims which do not arise out of the subject matter of the claims of the state which initiated the action. *National City Bank of New York v. Republic of China*, 348 U.S. 356, 75 S. Ct. 423, 99 L. Ed. 389 (1955); *Wacker v. Bisscn*, 348 F.2d 602, 610 (5th Cir. 1965); *American Hawaiian Ventures, Inc. v. M. V. J. Latuharhary*, 257 F. Supp. 622, 626-627 (D. N.J. 1966); see *Dexter & Carpenter, Inc. v. Kunglig Jarnvagsstyrelsen*, 43 F.2d 705 (2d Cir. 1930). The ultimate policy reason for this is simply that "fairness has been thought to require that when the sovereign seeks recovery, it be subject to legitimate counterclaims against it." *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 438, 84 S. Ct. 923, 945, 11 L. Ed. 2d 804 (1964); see *Pugh & McLaughlin, Jurisdictional Immunities of Foreign States*, 41 N.Y.U. L. Rev. 25, 53-54 (1966).

So viewed, there is no doubt that the assertion of First National City's defensive counterclaim as a set-off is not barred because plaintiff happens to be an instrumentality of the Cuban government. When a foreign government institutes suit in the courts of this country, it can expect nothing more and nothing less than substantial justice between the parties. Since the decision in *National City Bank of New York v. Republic of China* a suit brought by a foreign government is no longer a one-way street. The doctrine of sovereign immunity cannot be raised in this court as a technical bar to any legitimate defensive counterclaims or set-offs advanced by First National City.<sup>4</sup> Whether the

<sup>4</sup> *Pons v. Republic of Cuba*, 111 U.S. App. D.C. 141, 294 F.2d 925 (1961), cert. den., 368 U.S. 960, 82 S. Ct. 406, 7 L. Ed. 2d 392 (1962), is not to the contrary because the party there aggrieved by the Cuban confiscation was a Cuban national,

defendant has such legitimate defenses—and if so in what amount—are, of course, entirely separate questions.<sup>5</sup>

### III. *The Act of State Doctrine.*

The basis for defendant's set-off is that the Government of Cuba, in whose shoes Banco Nacional stands, confiscated eleven of First National City's Cuban branches without compensation and in violation of international law. Under *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 84 S. Ct. 923, 11 L. Ed. 2d 804 (1964), inquiry into the legality *vel non* of the expropriations here involved would be foreclosed by the act of state doctrine which forbids the courts of one country from sitting "in judgment on the acts of the government of another, done within its own territory." 376 U.S. at 416, 84 S. Ct. at 934, quoting *Underhill v. Hernandez*, 168 U.S. 250, 252, 18 S. Ct. 83, 42 L. Ed. 456 (1897). However, the holding in *Sabbatino* was for all practical purposes overruled by the Hickenlooper amendment to the Foreign Assistance Act of 1964, 22 U.S.C. § 2370(e)(2), as amended, 79 Stat. 658-659 (Sept. 6, 1965), the constitutionality of which has been upheld. *Banco Nacional de Cuba v. Farr*, 243 F. Supp. 957 (S.D. N.Y. 1965), *aff'd*, July 31, 1967 (2d Cir.). Congress there declared that the courts of this country should not refrain, on the ground of the act of state doctrine, from determining the merits in cases involving a confiscation after January 1, 1959, by an act of a foreign state "in violation of the principles of international law, including the principles of compensation." The Hickenlooper Amendment specifically stated that it did not apply "in any case in which an act of a foreign state is not contrary to international law".

<sup>5</sup> As mentioned, First National City has also interposed an affirmative counter-claim to recover the amount by which the compensation for the confiscations exceeds the \$1,810,880.51 figure. I hold, however, that plaintiff's limited waiver of immunity by instituting this suit permits only the assertion of a defensive counter-claim that "does not exceed the amount of the state's claims." Restatement (Second), Foreign Relations Law of the United States § 70(2)(a) (1965).

The ultimate act of state doctrine issue boils down to whether the confiscation of First National City's Cuban property violated principles of international law. In my view the seizures here involved had precisely this effect for a combination of reasons.

In the first place the various decrees authorizing the confiscations did not provide for adequate payments to First National City. The scheme of "illusory compensation" outlined by Judge Waterman in *Sabbatino*, 307 F.2d at 862, has been totally ineffective in practice in the intervening years. No compensation whatsoever appears to have been forthcoming and none can reasonably be expected in the foreseeable future.

It is true that both the Second Circuit and the Supreme Court in *Sabbatino* pointedly refrained from resolving the delicate question of whether the mere failure, without more, to provide adequate compensation to aliens whose property has been expropriated constitutes a breach of international law. 376 U.S. at 428-430, 84 S. Ct. 923; 307 F.2d at 862-864. But Congressional passage of the Hickenlooper Amendment has removed any doubt on this score—at least insofar as the courts of this country are concerned. While the reference to the "principles of compensation" in 22 U.S.C. § 2370(e)(2) is somewhat open-ended because it does not state specifically that compensation is a *sine qua non* of full compliance with international law, subsection (1) of the same statute leaves no doubt as to the views of Congress on the subject. That provision requires the suspension of assistance under the foreign aid program to the government of any state which, after effectuating the confiscation of property that is at least 50 per cent owned by United States citizens or corporations, "fails within a reasonable time \* \* \* to take appropriate steps \* \* \* to discharge its obligations under international law toward such citizen or entity, including speedy compensation for such property in convertible foreign exchange, equivalent to the full value thereof, as required by international law". The legislative

history of the Hickenlooper Amendment and its extensions is replete with statements reaffirming what is plain on the face of the legislation, i.e., that international law, at least from the parochial point of view of the United States, requires full compensation for seizures of American-owned property. S. Rep. No. 170, 89th Cong., 1st Sess. at 19; 110 Cong. Rec. 18936-37, 18946 (Aug. 14, 1964); 110 Cong. Rec. App. A5157 (daily ed. Oct. 7, 1964) (Senator Hickenlooper's Statement on Conference Report); see 22 U.S.C. § 2370(a)(2).

It is clear to me that this rule of compensation legislatively announced by Congress is fully consistent with generally accepted principles of international law established by the authorities reviewed by the appellate courts in *Sabbatino*. It is therefore unnecessary to reiterate the settled proposition that "the rules of international law \* \* \* are subject to the express acts of Congress." United States ex rel. Pfefer v. Bell, 248 F. 992 995 (E.D. N.Y. 1918). This court would accordingly be bound to apply the provisions of the Hickenlooper Amendment even if they were found to be inconsistent with the views of other nations on international law, though that is not so here. See *The Nereide*, 13 U.S. (9 Cranch) 388, 423, 3 L. Ed. 769 (1815); *Paquette Habana*, 175 U.S. 677, 700, 20 S. Ct. 290, 44 L. Ed. 320 (1900); *United States v. Siem*, 299 F. 582, 583 (9th Cir. 1924); *Schroeder v. Bissell*, 5 F.2d 838 (D. Conn. 1925); *Reeves, The Sabbatino Case and the Sabbatino Amendment: Comedy—or Tragedy of Errors*, 20 Vand. L. Rev. 429, 492-93 (1967).

There is more to this case, however, than a naked failure by the Cuban government to comply with general principles of compensation. Violations of international law spring from other sources also. The September 16, 1960, takeover of First National City's branch banks in Cuba had all the earmarks of the seizure of American-owned properties which Judge Waterman in *Sabbatino* condemned as violative of international law for reasons apart from the failure to

provide compensation. Here, as in *Sabbatino*, the expropriations were consummated under Cuban Law No. 851, July 6, 1960, which granted the government *carte blanche* authority to confiscate all properties owned by nationals of the United States. As Judge Waterman pointed out, see 307 F.2d at 865 n. 14, this law plainly was passed as a retaliatory measure against the United States Government's reduction of the sugar quota allotted to Cuba. On September 17, 1960, the day after the Cuban militia seized defendant's branches, the Cuban government issued Executive Power Resolution No. 2, which, like Resolution No. 1 involved in *Sabbatino*, justified the seizures of American-owned property as retaliation for an "act of cowardly and criminal aggression," that is, the reduction of the sugar quota.<sup>6</sup>

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<sup>6</sup> The vitriolic language of Resolution No. 2, Def. Ex. 22, left no doubt as to the retaliatory and discriminatory motivation for the bank seizures:

"Whereas: Law No. 851 of July 6, 1960, published in the *Gaceta Oficial* of July 7, authorized the undersigned to order jointly, whenever they consider it necessary to the defense of the national interest, the nationalization, by means of expropriation, of the assets and companies owned by natural or juristic persons who are nationals of the United States of America, or of companies in which the said persons have an interest or participation, even though the said companies were constituted in accordance with Cuban laws.

Whereas: It is not possible to allow a large share of the nation's banking to remain in the hands of the imperialist interests which, in an act of cowardly and criminal aggression, inspired the reduction of our sugar quota.

Whereas: Subsequent to the reduction of the sugar quota, the Government of the United States of America and the representatives of monopolistic interest of that country repeatedly committed acts of open aggression against the Cuban economy, such as those involving the curtailment of trade between the two countries, which had the obvious purpose of hampering the economic development of Cuba; and the imposition of embargoes on commercial aircraft owned by Cuban companies, under the legal guise of claims against civil debts, but which have the implicit purpose of curtailing our vital means of international communication, in an increasingly greater effort to isolate our country.

"[C]onfiscation without compensation when the expropriation is an act of reprisal does not have significant support among disinterested international law commentators from any country." 307 F.2d at 866. Thus the allegations in the decrees that the general public interest necessitated the seizures of First National City's property must be discounted when the manifest purpose of the confiscations was political retaliation of the rankest sort.

Moreover, as in *Sabbatino*, the reprisals involved in this case evidently evince discrimination rising to the level of a violation of international law. Not only was Law No. 851

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Whereas: One of the most efficient instruments of that imperialistic interference in our historical development has been typified by the operations of the American commercial banks, which have served as a financial vehicle to facilitate the monopolistic activities of the American companies in Cuba and the massive invasion of our country by imperialistic capital through usurious loans, which, far from promoting our economic growth, brought about in times of emergency numerous lawsuits resulting in the seizure of our national wealth by that imperialistic capital.

Whereas: It has always been the financial policy of these banks to encourage the activities of the American companies that devote their efforts to the procurement of our natural resources, the exploitation of our land by holders of large estates, and the mercantile operations that have contributed to the growing trend toward importing American manufactured goods, to the extent that it has hindered the development of national industries and has forced our economy to become dependent on a single crop and a single export.

Whereas: All this proves that the activities of American banks in Cuba have been a decisive factor in the disruption of our economic structure.

Whereas: It is unquestionable that the continuation of American banking interests in Cuba, a typical example of the imperialistic phenomenon, constitutes an obstacle to national liberation.

Whereas: In addition to the facts already stated, there is the deliberate practice of the United States Government designed to facilitate and to encourage, within its own territory, counter-revolutionary activities by war criminals and fugitive traitors.

Whereas: Furthermore, the work of international espionage in Cuban territory has been intensified under the sponsorship of that Government, with notorious contempt for international law and with



aimed solely at United States Nationals, but also a general confiscation of the remaining Cuban banking properties did not take place until October 14, 1960,<sup>7</sup> almost a month after First National City's branches were seized. Even then the end result was not that Cuban-owned enterprises and American-owned enterprises were treated alike, compare 307 F.2d at 845, because the compensation provisions for Americans, unlike those for Cuban citizens, were entirely dependent upon the creation of a fictitious fund consisting of "twenty-five per cent of the foreign exchange received by Cuba from its annual sales to the United States of Cuban

the obvious intention of promoting conspirational activities in our country.

Whereas: All these acts are undertaken for the purpose of destroying the great achievements of the Cuban Revolution, in the wicked hope of again subjecting our country to imperialistic oppression.

Whereas: We the undersigned realize that we should exercise the authority vested in us, and that we should proceed, in responsible discharge of the revolutionary duty, to nationalize all the American banks operating in our country, thus advancing still further on the road undertaken by our people, with firm patriotic will, toward the total economic independence of our nation.

Now, therefore: Exercising the authority vested in us, in accordance with the provisions of Law No. 851 of July 6, 1960,

**We Resolve:**

First, To order the nationalization, by expropriation, and consequently, award to the Cuban Government, in absolute ownership, all the assets, rights and shares deriving from the utilization thereof, especially the banks, including all their branches and agencies located in Cuba, which are the property of the following legal persons:

1. The First National City Bank of New York
2. The First National Bank of Boston
3. The Chase Manhattan Bank

Second: Accordingly, the Cuban State is hereby declared subrogated in the place and stead of the natural or juristic persons listed in the preceding paragraph with respect to the above mentioned property, rights, and rights of action, and to the assets and liabilities forming the capital of the above mentioned companies."

\* \* \* \* \*

<sup>7</sup> Law No. 891, Def. Ex. 10.



sugar in excess of three million Spanish long tons at a price of not less than 5.75 cents per English pound (f.a.s.).” 307 F.2d at 862. Beyond this, First National City obviously was damaged by discrimination to the extent it did not enjoy the profitable use of its Cuban properties during the period non-American bank enterprises operated unmolested.

#### IV.

The totality of circumstances presented by this case—a patent failure to provide adequate compensation, a retaliatory confiscation by a foreign government, and discrimination against United States nationals—compel a finding that the Cuban decree directing confiscation of First National City's property was in direct contravention of the principles of international law. Thus First National City is entitled to set-off against the first claim for relief such amount as may be due and owing to it from the Cuban Government as compensation for the seized Cuban properties, and I so hold.<sup>8</sup>

Banco Nacional is quite correct in pointing out that the amount owing to First National City from the Government of Cuba under the applicable international law “principles of compensation”<sup>9</sup> cannot be determined on this record. The actual amount of the set-off which can be asserted here poses delicate questions of fact and law requiring further careful consideration. See *Reeves*, supra at 505-508, for a consideration of some of the factors involved. It therefore

<sup>8</sup> The *Sabbatino* amendment is inapplicable “in any case with respect to which the President determines that application of the act of state doctrine is required in that particular case by the foreign policy interests of the United States and a suggestion to this effect is filed on his behalf in that case with the court.” 22 U.S.C. § 2370(e)(2). However, since the Executive Branch has maintained silence for the six years this action has been pending, it is clear that it has not determined that foreign policy interests of the United States require application of the act of state doctrine here.

<sup>9</sup> 22 U.S.C. § 2370(e).

cannot be determined on these motions whether, as defendant contends, the amount of the set-off equals or exceeds the sum of \$1,810,880.51 admittedly owing to the plaintiff. If it does, defendant is entitled to judgment dismissing count one.<sup>10</sup>

# V.

The second claim for relief may be speedily disposed of. It alleges that a number of Cuban banks which were nationalized pursuant to Law No. 891 in October, 1960, at that time maintained accounts with the defendant at its office in New York City. Banco Nacional as agent of the Cuban Government now lays claim to these funds, amounting to some \$33,812.93, by virtue of the confiscation decree declaring it to have full title to the property of the Cuban banks who maintained these accounts in New York.

The short answer to this claim is simply that "when property confiscated is within the United States at the time of the attempted confiscation, our courts will give effect to acts of state 'only if they are consistent with the policy and law of the United States.'" *Republic of Iraq v. First National City Bank*, 353 F.2d 47, 51 (2d Cir. 1965), cert. den., 382 U.S. 1027, 86 S. Ct. 648, 15 L. Ed. 2d 540 (1966), quoting ALI, Restatement of Foreign Relations Law § 46 (Proposed Official Draft, 1962). The Cuban decree, like the attempted confiscation of the accounts in *Republic of Iraq*, is plainly contrary to our policy and laws. It is not entitled to extraterritorial enforcement in United States courts as to property located within the United States. *Republic of Iraq v. First National City Bank*, supra; see *F. Palicio y Compania v. Brush*, 256 F. Supp. 481 (S.D. N.Y. 1966), aff'd per curiam, 375 F.2d 1011 (2d Cir. 1967); see Note, International Conflict of Laws: Limitations Imposed

<sup>10</sup> Any sum which First National City is permitted to set-off in this action will, of course, have to be taken into account by the United States Foreign Claims Settlement Commission in assessing claims filed by First National City. See International Claims Settlement Act, § 501, 78 Stat. 1110 (1964), 22 U.S.C. § 1643.

On Effect American Courts May Give Foreign Confiscations, 1966 Duke L.J. 828. Defendant is therefore entitled to judgment dismissing count two.

## VI.

In the light of what has been already said the motions before me are disposed of as follows:

(1) Defendant's motion for summary judgment on the second claim for relief is granted. Since I find there is no just reason for delay, it is directed that final judgment in favor of defendant will be entered accordingly. Rule 54(b), F.R.C.P.

(2) Plaintiff's cross-motion for summary judgment on its first claim and on the counterclaims is in all respects denied.

(3) Defendant's motion for summary judgment on the first claim is denied since there are triable issues of fact and law with respect to the amount of defendant's set-off. However, I hold that defendant is entitled to set-off as against the first claim for relief any amounts due and owing to it from the Cuban Government by reason of the confiscation of First National City's Cuban properties.

This opinion shall constitute my specification of the facts supporting that holding pursuant to Rule 56(d), F.R.C.P. The case will be tried on the sole issue of the amount which defendant is entitled to assert by way of set-off.

It is so ordered.

## APPENDIX F

### Statutes

*Foreign Assistance Act of 1961, 22 U.S.C. § 2370(e)(1), as amended, 78 Stat. 1012-1013 (Oct. 7, 1964):*

(e) (1) The President shall suspend assistance to the government of any country to which assistance is provided under this chapter or any other Act when the government of such country or any government agency or subdivision within such country on or after January 1, 1962—

(A) has nationalized or expropriated or seized ownership or control of property owned by any United States citizen or by any corporation, partnership, or association not less than 50 per centum beneficially owned by United States citizens, or

(B) \* \* \*

(C) \* \* \*

and such country, government agency, or government subdivision fails within a reasonable time (not more than six months after such action, or, in the event of a referral to the Foreign Claims Settlement Commission of the United States within such period as provided herein, not more than twenty days after the report of the Commission is received) to take appropriate steps, which may include arbitration, to discharge its obligations under international law toward such citizen or entity, including speedy compensation for such property in convertible foreign exchange, equivalent to the full value thereof, as required by international law, or fails to take steps designed to provide relief from such taxes, exactions, or conditions, as the case may be; and such suspension shall continue until the President is satisfied that appropriate steps are being taken, and no other provision of this chapter shall be construed to authorize the President to waive the provisions of this subsection.

\* \* \* \* \*

*Foreign Assistance Act of 1961, 22 U.S.C. § 2370(e)(2), as amended, 79 Stat. 658-59 (Sept. 6, 1965)—The Hickenlooper Amendment:*

(2) Notwithstanding any other provision of law, no court in the United States shall decline on the ground of the federal act of state doctrine to make a determination on the merits giving effect to the principles of international law in a case in which a claim of title or other right to property is asserted by any party including a foreign state (or a party claiming through such state) based upon (or traced through) a confiscation or other taking after January 1, 1959, by an act of that state in violation of the principles of international law, including the principles of compensation and other standards set out in this subsection: *provided*, That this subparagraph shall not be applicable (1) in any case in which an act of a foreign state is not contrary to international law or with respect to a claim of title or other right to property acquired pursuant to an irrevocable letter of credit of not more than 180 days duration issued in good faith prior to the time of the confiscation or other taking, or (2) in any case with respect to which the President determines that application of the act of state doctrine is required in that particular case by the foreign policy interests of the United States and a suggestion to this effect is filed on his behalf in that case with the court.

*International Claims Settlement Act of 1949, 22 U.S.C. §§ 1621 et seq.*

§ 1623(h) The Commission shall notify all claimants of the approval or denial of their claims, stating the reasons and grounds therefor, and, if approved, shall notify such claimants of the amount for which such claims are approved. Any claimant whose claim is denied, or is approved for less than the full amount of such claim, shall be entitled, under such regulations as the Commission may prescribe,

to a hearing before the Commission, or its duly authorized representatives, with respect to such claim. Upon such hearing, the Commission may affirm, modify, or revise its former action with respect to such claim, including a denial or reduction in the amount theretofore allowed with respect to such claim. The action of the Commission in allowing or denying any claim under this subchapter shall be final and conclusive on all questions of law and fact and not subject to review by the Secretary of State or any other official, department, agency, or establishment of the United States or by any court by mandamus or otherwise....

§ 1643 It is the purpose of this subchapter to provide for the determination of the amount and validity of claims against the Government of Cuba, or the Chinese Communist regime, which have arisen since January 1, 1959, in the case of claims against the Government of Cuba, or since October 1, 1949, in the case of claims against the Chinese Communist regime, out of nationalization, expropriation, intervention, or other takings of, or special measures directed against, property of nationals of the United States, and claims for disability or death of nationals of the United States arising out of violations of international law by the Government of Cuba, or the Chinese Communist regime, in order to obtain information concerning the total amount of such claims against the Government of Cuba, or the Chinese Communist regime, on behalf of nationals of the United States. This subchapter shall not be construed as authorizing an appropriation or as any intention to authorize an appropriation for the purpose of paying such claims....

§ 1643b (a) The Commission shall receive and determine in accordance with applicable substantive law, including international law, the amount and validity of claims by nationals of the United States against the Government of Cuba, or the Chinese Communist regime, arising since January 1, 1959, in the case of claims against the Government of Cuba, or since October 1, 1949, in the case of claims

against the Chinese Communist regime, for losses resulting from the nationalization, expropriation, intervention, or other taking of, or special measures directed against, property including any rights or interests therein owned wholly or partially, directly or indirectly at the time by nationals of the United States. . . .

§ 1643e In determining the amount of any claim, the Commission shall deduct all amounts the claimant has received from any source on account of the same loss or losses.

*Cuban Law of Nationalization No. 851*

I. DR. OSVALDO DORTICOS TORRADO, President of the Republic of Cuba, do hereby make known that the Council of Ministers has enacted and I have approved the following legislation:

WHEREAS, the attitude assumed by the government and the Legislative Power of the United States of North America, which constitutes an aggression, for political purposes, against the basic interests of the Cuban economy, as recently evidenced by the Amendment to the Sugar Act just enacted by the United States Congress at the request of the Chief Executive of that country, whereby exceptional powers are conferred upon the President of the United States to reduce the participation of Cuban sugars in the American sugar market as a threat of political action against Cuba, forces the Revolutionary Government to adopt, without hesitation, all and whatever measures it may deem appropriate or desirable for the due defense of the national sovereignty and protection of our economic development process.

WHEREAS, Article 24 of the Fundamental Law of the Republic authorizes the forced expropriation of property, leaving it to the ordinary laws to confer authority and competent jurisdiction to decree the expropriations and to regulate the procedure for the accomplishment thereof and



the means and terms for the payment of the expropriated property.

WHEREAS, it is advisable, with a view to the ends referred to in the first Whereas of this Law, to confer upon the President and the Prime Minister of the Republic full authority to carry out the nationalization of the enterprises and property owned by physical and corporate persons who are nationals of the United States of North America, or of enterprises which have majority interests or participations in such enterprises, even though they be organized under the Cuban laws, so that the required measures may be adopted in future cases with a view to the ends pursued.

Now, THEREFORE: In pursuance of the powers vested in it, the Council of Ministers has resolved to enact and promulgate the following

#### LAW No. 851

ARTICLE 1. Full authority is hereby conferred upon the President and the Prime Minister of the Republic in order that, acting jointly through appropriate resolutions whenever they shall deem it advisable or desirable for the protection of the national interests, they may proceed to nationalize, through forced expropriation, the properties or enterprises owned by physical and corporate persons who are nationals of the United States of North America, or of the enterprises in which such physical and corporate persons have an interest, even though they be organized under the Cuban laws.

ARTICLE 2. In the resolutions providing for the expropriations the President and the Prime Minister of the Republic shall declare the necessity, public utility and national interest justifying such action.

ARTICLE 3. The President and the Prime Minister of the Republic shall also designate in the resolutions above

referred to in Article 1 of this Law, the persons or agencies that shall have charge of the administration of the properties or enterprises expropriated hereunder.

**ARTICLE 4.** Once the expropriation of a property has been consummated and the administration thereof taken over by the person or agency designated therefor, the President and the Prime Minister of the Republic shall appoint appraisers of their election to determine the value of the expropriated property for the purposes of the payment thereof, which shall be effected as provided in the following article.

**ARTICLE 5.** The payment for the expropriated property shall be made, after the due appraisal thereof, in accordance with the following rules, to wit:

(a) The payment shall be made in Bonds of the Republic, which will be issued for that purpose by the Cuban State and shall be subject to the terms and conditions set forth in this Law.

(b) For the amortization of said bonds, and by way of security therefor the Cuban State shall set up a sinking fund which shall be fed annually with twenty-five per cent (25%) of the foreign exchange corresponding to the excess of the purchases of sugar made in each calendar year by the United States of North America over and above Three Million (3,000,000) Spanish Long Tons, for their domestic consumption, at a price of not less than 5.75 cents of a dollar per English pound (F.A.S.). To this end the National Bank of Cuba shall open a special dollar account which shall be captioned "Fund for the Payment of Expropriations of Properties and Enterprises of Nationals of the United States of North America".

(c) The Bonds shall draw at least two per cent (2%) annual interest, which shall be paid only and exclusively out of the fund to be set up and fed pursuant to Rule (b).

(d) Such annual interest as cannot be paid out of said Fund referred to above in Rule (b) shall not be cumulative, but the obligation to pay it shall be deemed extinguished.

(e) The Bonds shall be amortized in a period of not less than thirty (30) years counted from the date on which the expropriation of the property or enterprise involved is actually consummated, and the President of the National Bank of Cuba is hereby authorized to determine how and to what extent they will be amortized.

ARTICLE 6. The resolutions jointly issued by the President and the Prime Minister of the Republic in the forced expropriation proceedings instituted hereunder may not be appealed, as no remedial action shall be available there against.

ARTICLE 7. The Minister of the Treasury is hereby directed to issue, in the name and behalf of the Cuban State, the bonds with which the property expropriated hereunder will be paid for.

ARTICLE 8. This law supersedes all and whatever legal and statutory provisions may be repugnant hereto, or may conflict with the enforcement hereof, and shall become operative from the date of its publication in the Official Gazette of the Republic.

Now THEREFORE: I hereby order that this law to be fully and strictly observed and enforced.

Done at the Presidential Palace, in Havana, this 6th day of July, 1960.

OSVALDO DORTICOS TORRADO  
*President*

Fidel Castro Ruz, Prime Minister.

Rolando Díaz Aztaraín, Minister of the Treasury.

(Official Gazette No. 130, of July 7, 1960).

*Fundamental Law of Cuba*

ARTICLE 24. Confiscation of property is prohibited, but it is authorized for the property of the Tyrant deposed on December 31, 1958 and of his collaborators, of natural or juridical persons responsible for crimes committed against the national economy or the public treasury, and those who are enriched or have been enriched unlawfully under the protection of the public power. No other natural or juridical person can be deprived of his property except by competent judicial authority and for a justifiable reason of public benefit or social interest and always after payments of appropriate compensation in cash, fixed by court action. Non-compliance with these requirements shall give the person whose property has been expropriated the right to protection by the courts and, if the case warrants, to restitution of his property.

The reality of the grounds for public benefit or social interest and the need for expropriation shall be decided by the courts in the event of challenge.

ARTICLE 87. The Cuban State recognizes the existence and legitimacy of private property in its broadest concept as a social function and without other limitations than those which, for reasons of public necessity or social interest, are imposed by law.

## APPENDIX G

*Letter of Professor Olmstead amplifying his testimony at Hearings before the House Committee on Foreign Affairs on H.R. 7750, 89th Cong. 1st Sess. (1965), 578-615 passim, 1306:*

TEXACO, INC.,  
New York, N.Y., March 29, 1965.

HON. DONALD M. FRASER,  
House of Representatives,  
Washington, D.C.

DEAR CONGRESSMAN FRASER: We appreciated the opportunity to visit with you on March 17 and to discuss further the rule of law or *Sabbatino* amendment to the Foreign Assistance Act. It was most stimulating and interesting.

Our discussion of the possible general impact of this amendment on the property and activities of foreign governments indicated that it would be useful to amplify my interpretation of the proposed amendment. In accordance with your request, I am writing to supplement my answers to your questions at the hearing, and those answers should be read in the light of what I say here.

As you know, in addition to the "act of state" doctrine, with which our amendment is exclusively concerned, the separate doctrine of "sovereign immunity" controls when a foreign government may be sued or its assets attached. The general effect of the sovereign immunity rule as applied by our courts is that a foreign government cannot be sued or its property attached except in limited instances recognized in U.S. practice or in those cases where the foreign government itself waives its sovereign immunity by bringing suit in our courts.

Pursuant to the "Tate letter" of 1952 in which the United States accepted the so-called restrictive view of sovereign

immunity, the State Department has usually raised no objection to attachment of foreign government property utilized in activities of a "commercial nature"—if the claim sued on arose out of commercial activities outside the foreign state. It is our understanding that a claim arising out of an expropriation in a foreign country would not fall within this exception to sovereign immunity because (a) it does not arise out of ordinary commercial activities and (b) it arises from acts that took place within the territory of the foreign state.

The amendment that we are supporting does not in any way change these separate and distinct rules on sovereign immunity. The language of the amendment indicates that it applies only to a court's refusal to make a determination on the merits "on the ground of the Federal act of State doctrine." It would not apply to a refusal to make a determination on the merits in a case in which the doctrine of sovereign immunity would be appropriate.

I can summarize the foregoing by saying:

(a) The doctrine of sovereign immunity controls when a foreign government or its instrumentality may be sued and its property attached;

(b) The rule of law or *Sabbatino* amendment does not affect the doctrine of sovereign immunity;

(c) Under the rules of sovereign immunity now advanced by our State Department, an expropriated American investor can usually attach the commercial-type property taken from him if it comes within the jurisdiction of an American court, but he cannot attach other property of the Government unrelated to the expropriation in order to obtain compensation for the taking. In other words, he can attach his expropriated sugar or its proceeds coming from Castro Cuba but he cannot attach a Cuban Airlines plane landing at New York in the absence of a waiver of sovereign immunity.

If a foreign government waives the defense of sovereign immunity or it is otherwise inapplicable, the rule of law amendment can have an impact in disposing of a secondary defense based on the "act of state" doctrine. Thus, if Castro sues a U.S. bank whose branch he has seized in Havana for return of certain Cuban Government accounts or collateral held by the U.S. bank, the present U.S. rule (established in the Supreme Court decision in *National City Bank v. Republic of China*, 348 U.S. 356 (1955)) is that by bringing suit Castro has waived sovereign immunity and that the U.S. bank is permitted to make a counterclaim or setoff for the value of its seized Havana branch. In this counterclaim or setoff the U.S. bank could rely on the rule of law amendment in order to overcome a counterdefense based on the "act of state" doctrine. Thus, the impact of the rule of law amendment is determined by how the State Department and the courts apply the existing rules of sovereign immunity.

In view of your suggestion that this answer be included in the record, I am taking the liberty of sending a copy of this letter to Chairman Morgan for such inclusion.

With kindest personal regards, I am,

Sincerely,

CECIL J. OLMSTEAD.



JUL 14 1971

E. ROBERT SEAYER,

**FILE COPY**

No. 70-295

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**In the Supreme Court of the United States**

OCTOBER TERM, 1971

---

**FIRST NATIONAL CITY BANK, PETITIONER**

**v.**

**BANCO NACIONAL DE CUBA**

---

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED  
STATES COURT OF APPEALS FOR THE SECOND CIRCUIT**

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**MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE**

---

**ERWIN N. GRISWOLD,**

*Solicitor General,  
Department of Justice,  
Washington, D.C. 20530.*

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# In the Supreme Court of the United States

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED  
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## MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

This case involves a claim by Banco Nacional for excess collateral it had pledged with petitioner to secure a loan and a counterclaim by petitioner for that excess—conceded to be at least two million dollars—as an offset against the value of petitioner's property in Cuba expropriated by Cuba without compensation. The factual details and procedural history of the case are set forth in the two opinions of the court of appeals and the opinion of the district court, which are appended to the petition (see Pet. Apps. A, D and E).

(1)

Notwithstanding a letter stating the view of the Department of State<sup>1</sup> that important considerations of foreign policy should preclude application of the act of state doctrine to cases such as the present one, the court of appeals (Judge Hays dissenting) concluded that the doctrine applies. The decision thus raises important questions of interest to the United States concerning the roles of the Executive and Judicial Branches in the making of foreign policy.

1. In our view, the court of appeals' decision seriously impairs the power of the Executive over the control of foreign affairs both by rejecting the detailed and considered judgment of the Department of State that the foreign act of state rule should not govern this case and by narrowly limiting the *Bernstein* exception to that doctrine (*Bernstein v. N. V. Nederlandsche-Amerikaansche, etc.*, 210 F. 2d 375, 376 (C.A. 2)) (see Pet. App. A5-A9).

The fundamental consideration here concerns the responsibility of the Department of State to protect United States investments abroad. In the exercise of that significant responsibility, the Executive properly decided that the act of state doctrine—as a bar to decision of the case on the merits—should not be applicable

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<sup>1</sup> On November 17, 1970, we provided the Court with a copy of this letter. See Memorandum submitted by the Solicitor General in *First National City Bank v. Banco Nacional de Cuba*, No. 846, O.T. 1970. On January 25, 1971, the Court granted certiorari, vacated the judgment and remanded the case to the court of appeals "for reconsideration in light of the views of the Department of State" as set forth in that letter. 400 U.S. 1019. The letter is appended to the petition (Pet. App. C).

to the present class of cases. By restricting the power of the Executive Branch to determine that the act of state doctrine should not apply in certain cases, the decision below restricts the capacity of the government to assist American investors in securing prompt, adequate and effective compensation for expropriation of American property abroad.

The principle of fairness which underlies the decision in *National City Bank v. Republic of China*, 348 U.S. 356, should be applicable in this case as well. In that case the Court held that a foreign sovereign suing in a federal court waives its immunity as regards counterclaims brought by the defendant. The Court pointed out that in such circumstances the foreign sovereign "wants our law, like any other litigant, but it wants our law free from the claims of justice" (348 U.S. at 361-362); it concluded that in such a setting "fair dealing" outweighs the traditional rule of sovereign immunity (*id.* at 365). So here, an instrumentality of the expropriating foreign sovereign<sup>2</sup> should not be permitted to institute a suit and be immune from setoffs and counterclaims.

3. Finally, we submit that nothing decided in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, calls for denial of the present petition. *Sabbatino* made clear that it was not "laying down or reaffirming an inflexible and all-encompassing rule." 376 U.S. at 428.

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<sup>2</sup> As the district court pointed out, there "is no serious question that the Government of Cuba and Banco Nacional are one and the same for purposes of this litigation" (Pet. App. E4).

Moreover, the Court expressly avoided passing on the validity of the *Bernstein* exception, and pointed out that there had been no expression of State Department policy on the litigation in *Sabbatino* (376 U.S. at 420). Here the Department has made its position explicit. Accordingly, the important issue posed here—the application of the act of state doctrine despite the firm view of the Executive that it should not be applied in these circumstances—was not decided in *Sabbatino*.

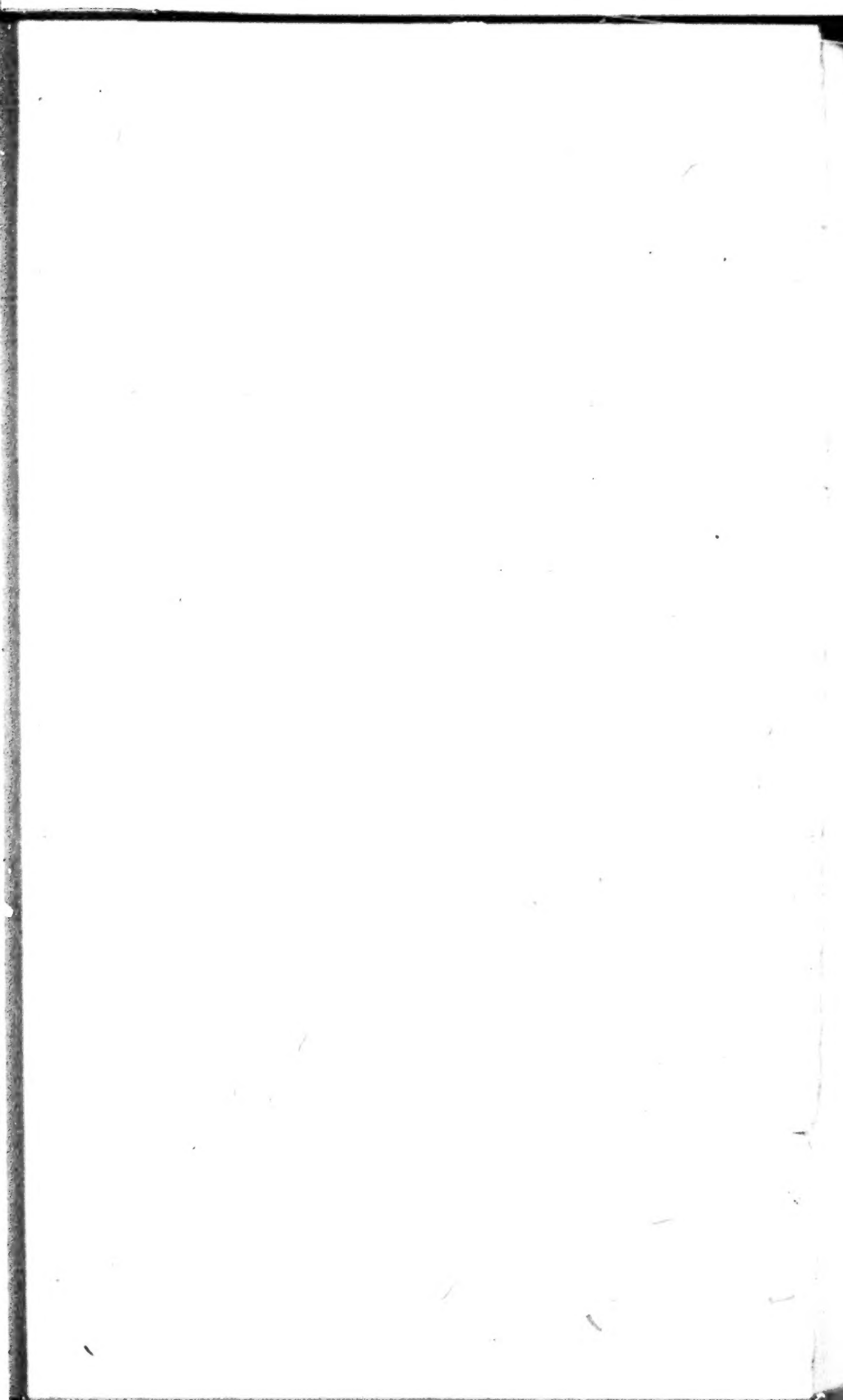
For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

ERWIN N. GRISWOLD,  
*Solicitor General.*

JULY 1971.







FILED  
AUG 30

IN THE  
**Supreme Court of the United States**  
October Term, 1971

No. 70-295

FIRST NATIONAL CITY BANK,

*against*

*Petitioner,*

BANCO NACIONAL DE CUBA,

*Respondent.*

**BRIEF IN OPPOSITION TO SECOND  
PETITION FOR CERTIORARI**

VICTOR RABINOWITZ

LEONARD B. BOUDIN

*Attorneys for Respondent*

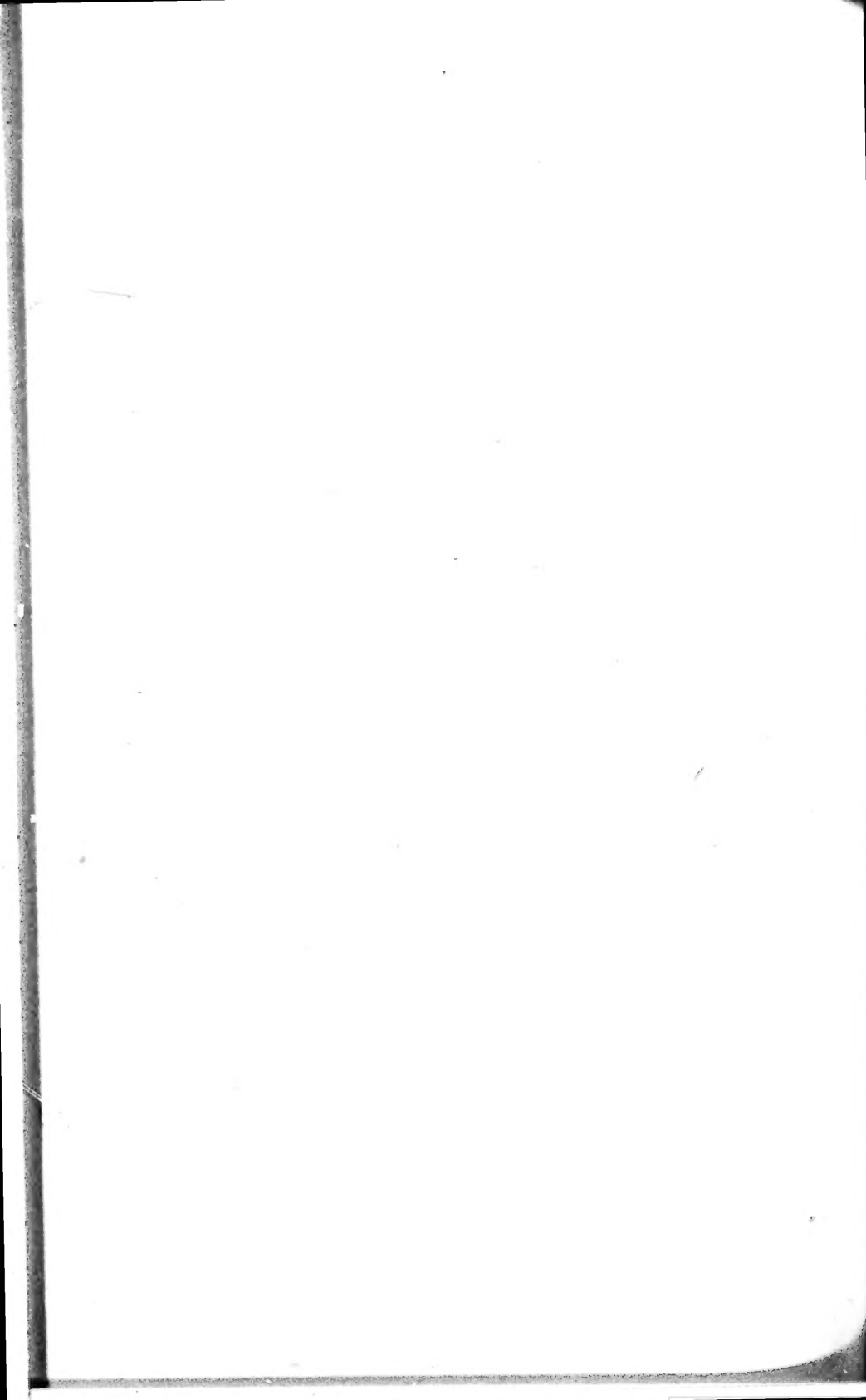
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*Of Counsel:*

KRISTIN BOOTH GLEN

September 1, 1971



# INDEX

	PAGE
Questions Presented .....	1
Statement .....	2
Reasons for Denying the Writ .....	3
CONCLUSION .....	21

## Table of Authorities

### CASES:

The Antelope, 23 U.S. (10 Wheat.) 66 .....	18, 19
Baker v. Carr, 369 U.S. 186 .....	15, 16
Banco Nacional v. Farr, 243 F. Supp. 957 (S.D. N.Y. 1965), aff'd 383 F. 2d 166 (2d Cir. 1967), cert. den. 390 U.S. 956 .....	11
Banco Nacional v. First National City Bank, 270 F. Supp. 1004 .....	18
Banco Nacional v. Sabbatino, 193 F. Supp. 375 (S.D. N.Y. 1961) .....	4
Banco Nacional v. Sabbatino, 376 U.S. 398 ..3, 4, 5, 6, 7, 8, 9, 10, 11, 15, 16, 17, 18	
Bernstein v. N.V. Nederlandsche Amerikaansche, etc., 173 F. 2d 71 (2d Cir. 1949) .....	6
Bernstein v. N.V. Nederlandsche Amerikaansche, etc., 210 F. 2d 375 (2d Cir. 1954) .....	6, 7
Bernstein v. Von Heyghen Freres Societe Ano- nymne, 163 F. 2d 246 (2d Cir. 1947), cert. den. 332 U.S. 772 .....	6

## CASES (Cont'd):

Chambers v. Cameron, 29 F. Supp. 742 (N.D. Ill. 1939) .....	12
Claridge Apartments Co. v. Commissioner, 323 U.S. 141 .....	17
Coale et al. v. Societe Co-Operative Suisse des Charbons, 21 F. 2d 180 (S.D.N.Y. 1927) .....	14
Commercial Pacific Cable Co. v. Philippine National Bank, 263 F. 218 (S.D.N.Y. 1920) .....	14
Cravatts v. Klozo Fastener Corp., 15 F.R.D. 12 (S.D.N.Y. 1953) .....	12
Davis v. Wechsler, 263 U.S. 22 .....	17
Den v. The Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272 .....	15
Durham v. Bunn, 85 F. Supp. 530 (E.D. Pa. 1949) .....	13
Epstein v. Shindler, 26 F.R.D. 176 (S.D.N.Y. 1960) .....	13
Erie Bank v. U. S. District Court, 362 F. 2d 539 (10th Cir. 1966) .....	12
Federal Radio Commission v. General Electric Co., 281 U.S. 464 .....	15
Federal Reserve Bank v. Early, 30 F. 2d 198 (4th Cir. 1929), aff'd 281 U.S. 84 .....	13
First National Bank v. Johnson County National Bank & Trust Co., 331 F. 2d 325 (10th Cir. 1964) .....	13
Forbes Pioneer Boat Line v. Board of Commissioners, 258 U.S. 338 .....	17
French v. Banco Nacional, 23 N.Y. 2d 46 (1968) ..	14
Gordon v. United States, 69 U.S. (2 Wall.) 561 ..	15

	PAGE
CASES (Cont'd):	
Graham v. Goodcell, 282 U.S. 409 .....	17
Greene v. United States, 376 U.S. 149 .....	17
Hasset v. Welch, 303 U.S. 303 .....	17
Hayburn's Case, 2 U.S. (2 Dall.) 409 .....	15
Higgins v. Shenango Pottery Co., 99 F. Supp. 522 (W.D. Pa. 1951) .....	12
Holzer v. Deutsche Reichsbahn-Gesellschaft, 277 N.Y. 474 (1938) .....	10
Keifer & Keifer v. Reconstruction Finance Corp., 306 U.S. 381 .....	14
Keller v. Potomac Electric Power Co., 261 U.S. 428	15
Libby v. Hopkins, 104 U.S. 303 .....	13
Lynch v. United States, 292 U.S. 571 .....	17
National City Bank v. Republic of China, 348 U.S. 356, reversing 208 F. 2d 627 (2d Cir. 1953), affirming 108 F. Supp. 766 (S.D.N.Y. 1952) ....	9, 13
Oetjen v. Central Leather Co., 246 U.S. 297 .....	10, 16
The Paquette Habana, 175 U.S. 677 .....	18
Pioche Mines Consol. v. Fidelity Philadelphia Trust Co., 206 F. 2d 336 (9th Cir. 1953), cert. den. 346 U.S. 899 .....	12
Pons v. Republic of Cuba, 294 F. 2d 925 (D.C. Cir. 1961), cert. den. 368 U.S. 960 .....	4
Postum Cereal v. California Fig Nut Co., 272 U.S. 693 .....	15
Rescue Army v. Municipal Court, 331 U.S. 549 ...	17
Ricaud v. American Metal Co., 246 U.S. 304 .....	5

## CASES (Cont'd):

Rich v. Naviera Vacuba, 197 F. Supp. 710 (E.D. Va. 1961), aff'd 295 F. 2d 24 (9th Cir. 1961), application for stay denied, U. S. Supreme Court, Sept. 11, 12 & 14, 1961 .....	4
Sawyer v. Hoag, 84 U.S. (17 Wall.) 610 .....	13
The Scotia, 81 U.S. (14 Wall.) 170 .....	19
Sloan Shipyards Corp. v. United States Shipping Board Emergency Fleet Corp., 258 U.S. 549 ...	14
Southern Railway Co. v. Elliot, 86 F. 2d 294 (4th Cir. 1936) .....	13
Swayne and Hoyt v. United States, 300 U.S. 297 ..	17
Underhill v. Hernandez, 168 U.S. 250 .....	5, 10
United States v. Curtis-Wright Export Corp., 299 U.S. 304 .....	16
United States v. Deutsches Kalisyndikat Gesellschaft, 31 F. 2d 199 (S.D.N.Y. 1929) .....	14
United States v. Wissahickon Tool Works, 84 F. Supp. 896 (S.D.N.Y. 1949) .....	12
United States ex rel. Rodriguez v. Weekly Publications, 74 F. Supp. 763 (S.D.N.Y. 1947) .....	12
United States ex rel. TVA v. Lacy, 116 F. Supp. 15 (N.D. Ala. 1953), rev'd on other grounds, 216 F. 2d 223 (5th Cir. 1954) .....	12
United States of Mexico v. Schmuck, 293 N.Y. 264 (1944) .....	14
Webster v. Fall, 266 U.S. 507 .....	10
Zion v. Sentry Safety Control Corp., 258 F. 2d 31 (3d Cir. 1958) .....	12

	PAGE
STATUTES:	
22 U.S.C. 2370(e)(1) .....	19
22 U.S.C. 2370(e)(2)—The Hickenlooper Amend- ment .....	1, 2, 5, 8, 9, 11, 15, 17
31 U.S.C. 8846 .....	13
REGULATIONS:	
Equity Rule 30 .....	13
Rule 13, Federal Rules of Civil Procedure ....	2, 12, 13
MISCELLANEOUS:	
Dawson and Weston, " <i>Prompt, Adequate and Effective</i> ," <i>A Universal Standard of Compensation?</i> , 30 Fordham L. Rev. 727 (1962) .....	19
Falk, <i>Toward a Theory of the Participation of Domestic Courts in the International Legal Order. A Critique of Banco Nacional de Cuba v. Sabbatino</i> , 16 Rutgers L. Rev. 1 (1961) .....	18
43 Department of State Bulletin 171 (1960) .....	16
Friedmann, <i>National Courts and the International Legal Order: Projections on the Implications of the Sabbatino Case</i> , 34 George Washington L. Rev. 443 (1966) .....	18
Hearings Before House Committee on Foreign Affairs, 89th Cong., 1st Session .....	8
Hearings Before Senate Committee on Foreign Affairs, 89th Cong., 2nd Session .....	8
New York Times, April 22, 1971, p. 11, col. 1 ....	8
Notes of Advisory Committee on Rules at 28 U.S. C.A., Note to Rule 13 .....	13



	PAGE
MISCELLANEOUS (Cont'd):	
<i>A Reconsideration of the Act of State Doctrine in United States Courts</i> , Association of the Bar of the City of New York (1959) .....	7
Reeves, <i>The Act of State Doctrine—Foreign Decisions Cited in the Sabbatino Case: A Rebuttal and Memorandum of Law</i> , 33 Fordham L. Rev. 599 (1965) .....	18
Stevenson, <i>The Sabbatino Case—Three Steps Forward and Two Steps Back</i> , 57 Amer. J. of Int. Law 97 (1963) .....	7
<i>Tate Letter</i> , 26 State Dept. Bulletin 984 .....	14
1 Whiteman: <i>Digest of International Law</i> 1 (1963)	19

IN THE  
**Supreme Court of the United States**

October Term, 1971

No. 70-295

---

FIRST NATIONAL CITY BANK,

*Petitioner,*

*against*

BANCO NACIONAL DE CUBA,

*Respondent.*

---

**BRIEF IN OPPOSITION TO SECOND  
PETITION FOR CERTIORARI**

---

**Questions Presented**

1. Is this Court bound by the suggestion of the State Department that henceforth there shall be an exception to the act of state doctrine, to wit, that such doctrine need not be applied when it is raised to bar adjudication of a counterclaim when (a) the foreign state's claim arises from a relationship between the parties existing when the act of state occurred, (b) the amount of the relief to be granted is limited to the amount of the foreign state's claim, and (c) the foreign policy interests of the United States do not require application of the doctrine?

2. Is the act of state doctrine unavailable to the respondent in this case merely because it is pleaded as a defense to a counterclaim?

3. Does the Hickenlooper amendment, 22 U.S.C. § 2370(e)(2), enacted to permit a court to pass upon

the validity of title to property expropriated by a foreign government when such property is marketed in the United States, apply to a counterclaim seeking compensation for the value of realty and intangible personalty nationalized by the Government of Cuba within its territory?

Respondent would answer all of the foregoing questions in the negative; if any of them is answered in the affirmative, one or more additional questions are presented, all raised in the Court of Appeals but not reached:

4. In an action brought by respondent against petitioner, is the Government of Cuba an "opposing party" within Rule 13(b) of the Federal Rules of Civil Procedure so as to permit petitioner to interpose a counterclaim against it?

5. Is respondent, a wholly owned instrumentality of the Government of Cuba, responsible for the debts of such Government?

6. Does the Hickenlooper amendment constitute an unconstitutional interference with the Judicial Branch in that it directs the Court to decide a question which this Court has already found to be nonjusticiable.

7. Both in terms of statutory interpretation and in terms of constitutionality, should the Hickenlooper amendment be given retroactive effect so that it is applicable to causes of action arising out of transactions completed prior to its enactment?

8. Did the Cuban Government violate international law when it nationalized the property of petitioner?

### Statement

As the petitioner points out (Petition for Certiorari, p. 4), there is no dispute as to the facts.<sup>1</sup> However, the

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<sup>1</sup> Except as to the precise relationship between respondent and the Government of Cuba. (See p. 14, *infra*.)

version of these facts, as set forth in the first opinion of the Court of Appeals (Pet. App. D, pp. D-2 to D-4) is less tendentious than petitioner's statement, and we are prepared to accept it as our own.

After the Court of Appeals had filed its first opinion, and after the petitioner had filed a petition for certiorari, the Solicitor General filed with this Court a letter from John R. Stevenson, Legal Adviser to the State Department, together with a suggestion that this Court remand the case to the Court of Appeals for reconsideration in view of that letter (Pet. App. C). This Court did so; on such reconsideration, the Court of Appeals affirmed its original opinion (Pet. App. A). The case is hence now before this Court on a second petition for certiorari. The Solicitor General has filed an amicus brief in support of this second petition, repeating and elaborating the suggestion made by Mr. Stevenson.

### Reason for Denying the Writ

1. The Legal Adviser to the State Department has written to this Court suggesting that the act of state doctrine, as expounded by this Court in *Banco Nacional v. Sabbatino*, 376 U.S. 398 "need not be applied when it is raised to bar adjudication of a counterclaim or set-off when . . . the foreign policy interests of the United States do not require application of the doctrine". The letter goes on to say that in the instant case the foreign policy interests of the United States do not require application of the act of state doctrine to bar adjudication of the petitioner's counterclaim (Pet., App. C, pp. C-5, C-6). In a brief *amicus curiae*, subsequently filed by the Solicitor General, the Executive Branch goes further, alleging that in "the present class of cases" (i.e., counterclaims), the act of state doctrine "should not be applicable" (Amicus brief, pp. 2 and 3). Petitioner argues that this letter requires a reversal of the Court of Appeals' order.

A brief review of the various positions taken by the Executive Branch with respect to Cuban litigation may be helpful. The first relevant case was *Pons v. Republic of Cuba*, 294 F. 2d 925 (D.C. Cir. 1961). There Cuba sued to recover money belonging to it in the possession of the defendant. The defendant counterclaimed for the value of his property which, he alleged, had been confiscated by the Cuban Government. The Court of Appeals invited the Executive Branch to file briefs, but no briefs were filed, and the court held the act of state doctrine applicable to the counterclaim. Certiorari was denied, 368 U.S. 960.

The next case was *Rich v. Naviera Vacuba*, 191 F. Supp. 710 (E.D. Va. 1961) *aff'd* 295 F. 2d 24 (4th Cir. 1961). In an application for a stay pending a petition for certiorari, one of the libellants, United Fruit Company, raised issues concerning title to property nationalized by the Cuban Government. The Justice Department responded with a brief opposing the claim on act of state grounds, and the application for a stay was denied, September 14, 1961.<sup>2</sup>

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<sup>2</sup> One highly relevant fact does not appear in the opinions: on August 16, 1961, the day before the *Bahia di Nipe* sailed into United States waters, the Cuban Government had returned to the United States an Eastern Air Lines plane which had been hijacked three weeks prior (New York Times, August 17, 1961, p. 8, col. 6).

From the political point of view, the United States could hardly refuse to return the freighter and its cargo, in view of the fact that Cuba had just returned an airplane which had come into Cuban territory under comparable conditions.

The case was litigated with unusual speed in view of the nature of the sensitive questions of sovereign rights which were involved and the reported decisions inadequately present the issues that were actually litigated. As the files of this Court will show, the opinions of the lower courts were based on a claim of sovereign immunity, supported by the State Department. However, the United Fruit Company, one of the libellants, claimed to own the cargo on the basis of facts which were a replica of those in *Sabbatino*, and sought a stay pending certiorari on grounds similar to those argued by the District Court in *Banco Nacional de Cuba v. Sabbatino*, 193 F. Supp.

When the *Sabbatino* case reached this Court, the Court again invited the Executive Branch to file an amicus brief. It did so<sup>3</sup> and, in fact, argued orally in support of the act of state doctrine. After the *Sabbatino* case was decided, Senator Hickenlooper proposed an amendment to the then pending Foreign Aid Act, and in the hearings held on that Act the Executive Branch once again warmly supported the act of state doctrine and opposed the amendment.<sup>4</sup>

In the instant case, the Executive Branch has completely reversed its position. Although it purports to limit its present stand to cases involving counterclaims, the reasons urged are applicable to any kind of claim, and it is irrational to make the applicability *vel non* of the act of state doctrine depend on accidents of pleading.

The full implications of the present position of the Executive Branch are indeed grave. Although it now says that its policy with respect to foreign expropriations requires only a refusal to accept the act of state doctrine, the fact is that the purpose of the administration, "to protect United States investment abroad" (Amicus Brief, p. 2) can be met only by an ultimate adjudication on the law in favor of the petitioner. Thus, the Executive is now demanding that the Court abandon the act of state doctrine, but if the needs set forth in the amicus brief are to be

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375, which had been decided four and one-half months before the *Rich* litigation arose. In denying the application for a stay, this Court cited *Underhill v. Hernandez*, 168 U.S. 250, and *Ricaud v. American Metal Co.*, 246 U.S. 304. The position taken by the Justice Department in that case would support the position of the respondent here, but would not have been possible under the Hickenlooper amendment.

<sup>3</sup> That brief will be referred to hereinafter as the *Sabbatino* Amicus Brief.

<sup>4</sup> See, *infra*, footnote 6, p. 8.

served by the Judiciary the Executive must next demand a ruling on the merits in favor of the petitioner regardless of the state of the law. Abandonment of the act of state doctrine may place this Court in the very dilemma it sought to avoid in *Sabbatino*: It may have to choose between a decision in favor of petitioner, notwithstanding the law, in order "to protect United States investments abroad" or a decision that the Cuban expropriations were consistent with international law, thus defeating an important position of the Executive Branch on the subject of expropriations—a foreign policy position which extends far beyond the present controversy. This possibility is a very real one, since the question of law in this case is one that is by no means free from doubt, as this Court pointed out in *Sabbatino*, pp. 428, 429.

This is precisely what the Attorney General warned against in the *Sabbatino* Amicus Brief (p. 46) when he said that the rule now proposed by the Executive Branch "offers too much likelihood of embarrassment simply because of a miscalculation of the likely ruling of the judicial forum upon a question of international law."

Petitioner and the amicus curiae rely principally on *Bernstein v. N.V. Nederlandsche Amerikaansche, etc.*, 210 F. 2d 375 (2d Cir. 1954). We think the petitioner in error.

The *Bernstein* case arose out of unusual set of facts. See *Bernstein v. Van Heyghen Freres S.A.*, 163 F. 2d 246 (2d Cir. 1947), *cert. den.* 332 U.S. 772; *Bernstein v. N.V. Nederlandsche Amerikaansche, etc.*, 173 F. 2d 71 (2d Cir. 1949) and *Bernstein v. N.V. Nederlandsche Amerikaansche, etc.*, *supra*. We respectfully submit it was one of those hard cases that made doubtful law. It was characterized by the Justice Department in 1963 as "an exceedingly narrow exception" to the act of state doctrine (*Sabbatino* Amicus Brief). The "Bernstein" exception has been applied only once in the history of the United States, in the *Bernstein* case itself, and was not considered by this Court



even on that single occasion. The Court of Appeals has cogently distinguished the *Bernstein* case, Pet. App. A, pp. A-5 to A-11.

The proposal now made by Mr. Stevenson was first made, in slightly different form by the Committee on International Law of the Association of the Bar of the City of New York in 1959, in a report entitled *A Reconsideration of the Act of State Doctrine in the United States Courts*.<sup>5</sup> It was there proposed that the act of state doctrine should be limited to those cases in which the Executive Branch expressly stipulates that it does not wish the court to pass upon the question of the validity of the act of a foreign sovereign. This proposal was discussed by the Supreme Court in *Sabbatino* on page 436, and was rejected for the reasons set forth in the Court's opinion. Those reasons were discussed at somewhat greater length in the *Sabbatino* Amicus Brief, at page 44:

"Such a rule would . . . put an embarrassing burden upon the Executive. In the conduct of international relations, it may be of the utmost importance to preserve silence or at least to refrain from issuing official documents upon the legal status of the act of a foreign government. The proposed rule would compel the Executive either to issue a formal statement in advance of litigation whenever a foreign government had issued a decree that someone might claim affected the title to property within its jurisdiction in violation of international law, or else to keep track of court dockets all over the country lest a case that would embarrass the con-

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<sup>5</sup> The present Legal Adviser to the State Department was then Chairman of the International Law Committee of the Bar Association. The same views were expressed by him in 1963 in 57 Amer. J. of Int. Law 97, entitled *The Sabbatino Case—Three Steps Forward and Two Steps Back*, a commentary on the Court of Appeals decision in the *Sabbatino* case. Mr. Stevenson was then a member of the Board of Editors of the American Journal of International Law. The view was again put forward before this Court in the *Sabbatino* case itself.

duct of foreign relations go to judgment without the Executive's raising the bar. Even if this burden were eased by requiring notice to the Executive before the presumption of executive consent would be invoked, the Executive would still face the embarrassment of taking a position when silence would be wiser, or of announcing its position at a moment highly inopportune from the diplomatic standpoint in order to suit the convenience of private litigation." <sup>6</sup>

Mr. Stevenson's letter in this case modifies the proposal made by him eight years ago only in that he now limits it to cases where the act of state doctrine is advanced as the defense to a counterclaim. Neither Mr. Stevenson, in his letter, nor petitioner, have made any effort to answer what this Court said in the *Sabbatino* case, what the Executive Branch said in the *Sabbatino* Amicus Brief, or what the Attorney General said in his congressional testimony, Hearings before the Committee on Foreign Affairs, *supra*, at pages 1241, 1244 and *passim*.

The variety of positions taken by the Executive Branch on the subject of nationalization in the Cuban litigation alone is striking. Historically there has been a great deal of difference of opinion within the Executive Branch concerning the treatment of expropriation.<sup>7</sup> For example, the facts in the *Pons* case are the same as in the present case save that the party in office has changed. It is not unusual that different administrations should have different views on policy, but it is quite another thing to require

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<sup>6</sup> The same point was also made by the Executive Branch in its testimony before Congress when it was considering the Hickenlooper Amendment. See Hearings before Committee on Foreign Relations, United States Senate, 88th Cong., 2d Sess. on S. 2659, 2660, 2662 and H.R. 11380, pp. 618, 619; Hearings Before the Committee on Foreign Affairs, House of Representatives, 89th Cong., 1st Sess., on H.R. 7750, p. 1234.

<sup>7</sup> See, for example, New York Times, April 22, 1971, p. 11, col. 1.

the judiciary to follow every such change in policy, especially since some of them are quite sudden and unexpected. The result would be to turn the Court into an instrument of the foreign, or perhaps even the domestic, policies of the Administration. This is contrary to the principle of the separation of powers and inconsistent with the integrity of the Judicial Branch, which cannot and should not be placed in a position where its decisions on important questions of international law vary from time to time as one administration succeeds another.

2. Petitioner further argues, as it has consistently argued below, that the act of state doctrine is not applicable to any cases involving a counterclaim, so that quite regardless of Mr. Stevenson's letter and regardless of the Hickenlooper amendment (for which see below, pp. 10, 11), this Court's ruling in *Sabbatino* is not applicable here (Pet. p. 7).<sup>8</sup>

But every legal argument and every consideration of policy set forth by this court in *Sabbatino* is just as applicable to a counterclaim as to any other kind of claim. Nor (contrary to the views expressed by the United States in its amicus curiae brief at p. 3) is there anything in *National City Bank v. Republic of China*, 348 U.S. 356 which leads to any other result. That was an action by the Government of China to recover a sum of money on deposit with the defendant bank. The defendant interposed counterclaims arising out of the failure of the plaintiff to repay certain loans made to or guaranteed by it. Plaintiff moved to dismiss the counterclaim on grounds of sovereign immunity, thereby conceding, as a matter of pleading, that the counterclaims otherwise stated good causes of action. The District Court granted the motion, 108 F. Supp. 766

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<sup>8</sup> This view has been developed much more fully in the past by the petitioner. See, for example, the first petition for certiorari in this case, pages 5-10, and petitioner's brief to the Court of Appeals on the first appeal, pages 17-20.

(S.D.N.Y. 1952); the Court of Appeals affirmed, 208 F. 2d 627 (2d Cir. 1953), and this Court reversed in a 5 to 3 decision, remanding the case to the District Court "with directions to reinstate the counterclaims", 348 U.S. at 366.

The words "act of state" or their equivalent do not appear in any of the briefs or the opinions written in the case, nor are any of the leading act of state cases cited. The plaintiff subsequently filed a reply to the counterclaim but did not allege that its failure to pay its debts was an act of state. In short, the concept that China's default may have been an "act of state" with *Sabbatino*-like consequences is totally missing from that litigation. "Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *Webster v. Fall*, 266 U.S. 507, 511 (1925).

There is nothing to be gained by a discussion as to whether the defense of act of state would have been available to the Republic of China.<sup>9</sup> That case represents a much mooted point in the field of the enforcement of international claims and nothing warrants extending it to cover matters that were not before the Court and which were never considered by it. The case stands only for the principle that a plea of sovereign immunity is not available as a defense to a counterclaim.

In this case, respondent has *not* pleaded sovereign immunity. The whole issue is whether the counterclaim states a justiciable claim; *Sabbatino* teaches that it does not.

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<sup>9</sup> There may be some question as to whether a simple failure to meet a debt, unaccompanied by any specific act of repudiation, constitutes an Act of State within cases such as *Sabbatino*, *Oetjen v. Central Leather Co.*, 246 U.S. 297 (1918) and *Underhill v. Hernandez*, 168 U.S. 250 (1897). Cf. the treatment by the New York Court of Appeals of the second cause of action in *Holzer v. Deutsche Reichsbahn-Gesellschaft*, 277 N.Y. 474 (1938).

3. Both courts below assumed that petitioner's claim is barred by this Court's decision in the *Sabbatino* case unless it comes within the terms of 22 U.S.C. 2370(e)(2), generally referred to as the Hickenlooper amendment.<sup>10</sup> We think this is clearly so and that the Hickenlooper amendment does not apply.

The reasons for this conclusion are set forth in considerable detail by the Court of Appeals in its first opinion (Pet., pp. D-10 to D-23). An additional observation should be made:

In response to the comprehensive survey of the legislative history of the Hickenlooper amendment made by the Court of Appeals in its first opinion (App. D, pp. D-13 to D-18), the petitioner now calls attention for the first time to a letter by Professor Olmstead to the committee, which is reprinted in the petition for certiorari as Appendix G. That letter was written after Professor Olmstead had testified before the committee. It seems to have been written with this case in mind. It is, on its face, inconsistent with the testimony given by Professor Olmstead when he appeared in person before the committee and was questioned closely by its members. His original testimony is quoted by the Court of Appeals in its opinion, Apperdix D, pages D-15, D-16. It is the only element in the two year legislative history which petitioner cites in support of its position.

If certiorari is granted, and if any of the three propositions argued above be decided adversely to the respondent, several additional issues are raised, which were raised in the Court of Appeals but never reached.

4. The first of these (a contention which the court below found had "some justification," Pet. App. D, p. D-7) is that petitioner's claim should have been dismissed

<sup>10</sup> The background of the Hickenlooper amendment is discussed fully in the District Court opinion in *Banco Nacional v. Farr*, 243 F. Supp. 957 (S.D.N.Y. 1965), aff'd 383 F. 2d 166 (2d Cir. 1967), cert. den. 390 U.S. 956.



because (a) the counterclaim was invalid procedurally in that it was directed against the Government of Cuba, which is not an "opposing party" under Rule 13 of the Federal Rules of Civil Procedure, or (b) assuming the counterclaim to be proper procedurally, respondent is not in fact liable for the obligations of the Government of Cuba or (c) at the very least this issue raised a triable issue of fact, Pet. App. D, pp. D-7 to D-8.

"Opposing parties", as used in Rule 13, means not only that the plaintiff must be the same person as the person cross-sued by the defendant, but that "the cause of action to be counterclaimed must be against . . . the same parties . . . in the same capacity." *Zion v. Sentry Safety Control Corp.*, 258 F. 2d 31 (3d Cir. 1958). See also *Erie Bank v. U. S. District Court*, 362 F. 2d 539 (10th Cir. 1966); *Cravatts v. Klozo Fastener Corp.*, 15 F.R.D. 12 (S.D. N.Y. 1953); *Pioche Mines Consol. v. Fidelity-Philadelphia Trust Co.*, 206 F. 2d 336, 337 (9th Cir. 1953), cert. den. 346 U.S. 899 (1953); *Higgins v. Shenango Pottery Co.*, 99 F. Supp. 522 (W.D. Pa. 1951); *Chambers v. Cameron*, 29 F. Supp. 742 (N.D. Ill. 1939).

Hence petitioner's counterclaim against the Government of Cuba cannot be pleaded in this action. Banco Nacional is not the same as the Government of Cuba, and even if it were, the claim against the petitioner is a claim brought by a bank in its capacity as bank, and a counterclaim cannot be brought against it as representative of the Government of Cuba. *United States ex rel. TVA v. Lacy*, 116 F. Supp. 15 (N.D. Ala. 1953) rev'd on other grounds, 216 F. 2d 223 (5th Cir. 1954); *United States v. Wissahickon Tool Works*, 84 F. Supp. 896, 901 (S.D.N.Y. 1949).<sup>11</sup>

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<sup>11</sup> In a *qui tam* action where the government sues on behalf of an individual (i.e. non-governmental informer, the same rules apply and a counterclaim may only be interposed against the true "opposing party". See *United States ex rel. Rodriguez v. Weekly Publications*, 74 F. Supp. 763, 768-69 (S.D.N.Y. 1947) for a discussion of how this determination of the real party is made for Rule 13 purposes.

See also *Epstein v. Shindler*, 26 F.R.D. 176 (S.D.N.Y. 1960); *First National Bank v. Johnson County National Bank & Trust Co.*, 331 F. 2d 325 (10th Cir. 1964); *Durham v. Bunn*, 85 F. Supp. 530 (E.D. Pa. 1949).<sup>12</sup>

It was Banco Nacional and not the Government of Cuba which instituted suit against the petitioner in the instant action.<sup>13</sup> Hence, Rule 13 would limit counterclaims to those against Banco Nacional *qua* bank; no counterclaims could lie against Banco Nacional *qua* Government.

Quite aside from the propriety of the counterclaim under rule 13, the cause of action alleged by the petitioner purports to be a claim against the Republic of Cuba and not against Banco Nacional. Therefore, Banco Nacional would not be liable even in an action brought directly against it, since a government owned corporation is not liable for the debts of the government.

Corporations similar in their organic structure to Banco Nacional exist not only in Cuba, but in almost every other country of the world. The United States has many, 31 U.S.C. § 8846. While we have not found any cases presenting precisely the issues which petitioner raises here (perhaps because no one has heretofore suggested that a

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<sup>12</sup> Rule 13 did not change Equity Rule 30 in any respect relevant to this issue (see Notes of Advisory Committee on Rules at 28 U.S.C.A., Note to Rule 13). *Southern Railway Co. v. Elliott*, 86 F. 2d 294 (4th Cir. 1936); *Federal Reserve Bank v. Early*, 30 F. 2d 198 (4th Cir. 1929); *aff'd* 281 U.S. 84 (1930); *Libby v. Hopkins*, 104 U.S. 303 (1881); *Sawyer v. Hoag*, 84 U.S. (17 Wall.) 610 (1873).

<sup>13</sup> This is, of course, the converse of the situation in *National City Bank of New York v. Republic of China*, *supra*, where it was the Republic which sued to collect money deposited in the defendant bank by one of its governmental agencies. Since it was the named party there, a counterclaim was permitted against it as the Republic of China under Rule 13, although no counterclaim would presumably have lain against its agency, the Shanghai-Nanking Railway Administration.



government-owned corporation is responsible for debts of the government), there are many analogous situations in which the separate corporate identity of such government-owned corporations has been recognized.

A corporation, even if an "instrumentality" of a foreign government, wholly owned and controlled by it, is still a separate entity. See *Keifer & Keifer v. Reconstruction Finance Corp.*, 306 U.S. 381 (1939); *Sloan Shipyards Corp. v. United States Shipping Board Emergency Fleet Corp.*, 258 U.S. 549 (1922). This conclusion has been reached even when, unlike the present situation, a foreign government has asserted the substantial identity of the government and the corporation. See, for example, *United States v. Deutsches Kalisyndikat Gesellschaft*, 31 F. 2d 199, 202 (S.D.N.Y. 1929).

*A fortiori*, the same conclusion must be reached here, where the foreign government asserts that as a matter of its own law, the corporation and the government are separate. At the very least such an assertion raises a question of fact. *United States of Mexico v. Schmuck*, 293 N.Y. 264 (1944); *Coale et al. v. Societe Co-Operative Suisse des Charbons*, 21 F. 2d 180 (S.D.N.Y. 1921); *Commercial Pacific Cable Co. v. Philippine National Bank*, 263 F. 218 (S.D.N.Y. 1920).

It has been argued that Banco Nacional has, on occasion (but *not* in this suit) pleaded sovereign immunity as a defense to a claim. Such pleas, where made, have been overruled on the precise ground that Banco Nacional is *not* the Government of Cuba, but is a separate entity engaging in non-governmental functions. *French v. Banco Nacional*, 23 N.Y. 2d 46 (1968). Further, immunity is not determined by the character of the corporation claiming it, but by the nature of the transaction. "Tate Letter", 26 State Dept. Bulletin 984. Hence the same entity might well be entitled to immunity in one lawsuit but not in another.

Should this Court accept petitioner's proposition the door would be left wide open for the creditors of any nation to proceed to litigation against the sovereign by issuing a summons against one of the sovereign's commercial corporations on the theory that the sovereign and its wholly owned corporation were identical. Such a principle would create anarchy in international trade, and its effect on our own government would be disastrous. It would make our government corporations, some of which operate in every corner of the world, subject to constant harassment.

5. If the Hickenlooper amendment is applicable, profound questions are raised with respect to the allocation of powers between the three branches of government. The statute invades the power of the Judiciary; it is, furthermore, unconstitutional as applied to the instant case since this action was pending at the time the amendment was enacted.

(a) From the earliest days of the Republic, the Judiciary has closely guarded its independence from either Executive or Legislative interference. *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792); *Den v. The Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 284 (1856); *Gordon v. United States*, 69 U.S. (2 Wall.) 561 (1865); *Keller v. Potomac Electric Power Co.*, 261 U.S. 428 (1923); *Postum Cereal v. California Fig Nut Co.*, 272 U.S. 693 (1927); *Federal Radio Commission v. General Electric Co.*, 281 U.S. 464 (1930). This Court has already decided in *Sabbatino* that the validity of the taking of property by a foreign sovereign government within its own territory is not a subject for judicial determination. Congress may not compel it to make such a determination.

In *Baker v. Carr*, 369 U.S. 186, 217 (1962), this Court set down the circumstances under which it would hold certain kinds of political questions to be nonjusticiable. Most of the elements discussed by this Court in that opinion

can be found in this record. This case involves foreign relations, an issue constitutionally committed to the Executive Branch, *Oetjen v. Central Leather Co.*, *supra*, at 309; *Baker v. Carr*, *supra*, at 246; *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936); there is "a lack of judicially discoverable and manageable standards for resolving it" (see *Sabbatino*, *supra*, at 428-430); the court cannot undertake "independent resolution [of the issue] without expressing lack of the respect due" the Executive Branch; there is "an unusual need for unquestioning adherence to a political decision already made" and there is a great "potentiality of embarrassment from multifarious pronouncements of various departments on one question." *Baker v. Carr*, *supra*, at 217.

The last few considerations deserve special attention, for the potentiality of embarrassment to the Executive Branch and the need for unquestioning judicial adherence to political decisions already made are nowhere better illustrated than in this case. The State Department has twice protested, through diplomatic channels, that the Cuban nationalizations violated international law. 43 Department of State Bull. 171, 316(1960). In terms of the need that our government should speak with a single voice in the area of foreign affairs, if the principle of *Sabbatino* were to be discarded a court would be placed in an intolerable position. It could not make a contrary decision without serious embarrassment to the Executive Branch and injury to the national interest.<sup>14</sup>

We do not argue that all "political questions" or even all "foreign relations questions" are nonjusticiable. *Baker v. Carr*, *supra*, at 211. But only a court can determine which political questions and which foreign relations questions are justiciable and it is not to take direction from any other branch of the Government on this issue. A determination of nonjusticiability, like a determination of

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<sup>14</sup> See discussion pp. 5, 6 and footnote 2, p. 4, *supra*.

lack of jurisdiction, is an essential part of the exercise of judicial power. Questions such as these involve many delicate policy considerations arising out of the "court's appropriate place" within our governmental structure. *Rescue Army v. Municipal Court*, 331 U.S. 549, 568 (1947).

(b) A threshold question of statutory interpretation is presented as to whether the Hickenlooper amendment is applicable to litigation based on causes of action arising out of transactions completed before its passage. If it is, it is unconstitutional.

The statute itself contains no express language with respect to its retroactivity and there is a presumption that past transactions are excluded. *Claridge Apartments Co. v. Commissioner*, 323 U.S. 141, 164 (1944). See also *Davis v. Wechsler*, 263 U.S. 22, 25 (1923); *Hasset v. Welch*, 303 U.S. 303, 314 (1938); *Greene v. United States*, 376 U.S. 149, 160 (1964).

A statute ought to be interpreted so as to avoid constitutional questions when possible. The constitutional due process questions raised by a retroactive statute are difficult and such statutes have generally been held invalid. *Swayne and Hoyt v. United States*, 300 U.S. 297 (1937); *Lynch v. United States*, 292 U.S. 571 (1930); *Graham v. Goodcell*, 282 U.S. 409 (1931); *Forbes Pioneer Boat Line v. Board of Commissioners*, 258 U.S. 338 (1922).

6. The Hickenlooper amendment directs the court to decide cases coming within its terms "on the merits". The amendment, within the space of a single paragraph, makes three references to international law and it is therefore quite clear that if the statute is constitutional and applicable, the courts must apply substantive rules of international law to the Cuban nationalization of the property of petitioner.

The application of the Hickenlooper amendment to this case will therefore raise the precise issue which was raised in *Sabbatino*, but which the Court found it unnecessary

to decide, namely, the obligation of a sovereign to pay just compensation when it takes alien property. See 376 U.S. at 428-430. Our courts have always held, from *The Antelope*, 23 U.S. (10 Wheat.) 66 (1825) at 122, and *The Paquette Habana*, 175 U.S. 677 (1900) at 700, to *Sabbatino* at 427, 428, that international law is made by the practice of nations. There is no consensus among the nations of the world on the subject of the obligation of a nationalizing sovereign to pay just compensation.

Obviously we shall not in this brief review all of the cases on the subject. Many of them are discussed in the brief submitted by this respondent, as petitioner on the merits in the *Sabbatino* case and the Court is respectfully referred to pages 34 to 51 of that brief if it reaches this subject.<sup>15</sup>

Petitioner may rely on a single clause in the Hickenlooper amendment which refers to a confiscation "in violation of the principles of international law, including the principles of compensation and other standards set out in this subsection". See *Banco Nacional de Cuba v. First National City Bank of New York*, 270 F. Supp. 1004, 1008 (S.D.N.Y. 1967). This is presumably a reference to subd.

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<sup>15</sup> Most of the cases upon which petitioner will ultimately rely are from foreign jurisdictions. A note of caution in treating of such cases is in order. The matter was discussed with considerable insight and against the background of a lifetime of experience in this field by the late Harvey Reeves in *The Act of State Doctrine—Foreign Decisions Cited in the Sabbatino Case: A Rebuttal and Memorandum of Law*, 33 Fordham L. Rev. 599 (1966). For another post-*Sabbatino* discussion of the subject, see Friedmann, *National Courts and the International Legal Order; Projections on the Implications of the Sabbatino Case*, 34 George Washington L. Rev. 443 (1966); for a discussion of the lower court opinions in *Sabbatino*, see Falk, *Toward a Theory of the Participation of Domestic Courts in the International Legal Order: A Critique of Banco Nacional de Cuba v. Sabbatino*, 16 Rutgers L. Rev. 1 (1961).



(1) of subsection (e) of 22 U.S.C. § 2370 which, if read literally, purports to be a Congressional enactment of international law.

But Congress cannot make international law. "As no nation can prescribe a rule for others, none can make a law of nations". *The Antelope*, *supra*, at 122. See also 1 Whiteman: Digest of International Law 1 (1963); *The Scotia*, 81 U.S. (14 Wall.) 170, 187 (1872). Congress may direct that municipal law may be applied in lieu of international law, but it did not make that direction here and in fact repeatedly directed the contrary. And the "principles of compensation" referred to in subdivision (1) bear no resemblance either to international law or practice. Dawson and Weston: "*Prompt, Adequate and Effective*", a *Universal Standard of Compensation?* 30 Fordham L. Rev. 727 (1962).

The Court must therefore interpret statutory language which is inherently inconsistent and contradictory. The crux of the difficulty lies within the language of § 2370(e) (1); that difficulty vanishes if the clause reading "equivalent to the full value thereof, as required by international law" is read as meaning "equivalent to the full value thereof to the extent required by international law". This reading will effectuate the evident intent of Congress that international law should be applied and yet will leave to the courts the determination of the requirements of international law, a usual judicial function.

5. There are two other "Questions Presented" by the petitioner which we think totally without foundation, but which should be mentioned for the sake of completeness.

The first Question Presented (Pet. p. 2) and the discussion relevant thereto (Pet. pp. 7-9) seems to proceed on the assumption that the order of this Court dated January 25, 1971, remanding the case to the Court of Appeals, was a direction to that court that it reverse its judgment of July 16, 1970, and make a different decision.

Thus it is argued that the majority of the Court of Appeals "failed to comply with the mandate of this Court" because it "persisted in its own conclusion that the act of state doctrine operates as a bar" (Pet. p. 8).

In its order remanding the case, this Court specifically stated that "In taking this action the Court is expressing no views on the merits of the case" (Pet. App. B). The merits were hence properly before the Court of Appeals, as the petitioner recognized when it briefed and argued the case before that court.

The fourth Question Presented suggests that a decision of the Foreign Claims Settlement Commission might be decisive of the issues on this petition (Pet. p. 3). It is hardly conceivable that this contention is put forward in good faith. The decision of the Commission on which petitioner now relies is dated November 14, 1969. This case was first argued in the Court of Appeals four months later, on March 23, 1970 but the Commission's decision was not relied on in that court nor was it even mentioned in its brief or argument. This failure to call to the attention of the court below a proceeding which it is now claimed has decisive effect on this litigation, can hardly have been an oversight.

The fact is, as petitioner knows full well, the argument has not even the shadow of merit. The Foreign Claims Settlement Commission is not an adjudicatory body and its rules do not even permit adversary proceedings. Respondent was not a party to those proceedings and did not even know that a claim had been filed, that it was under consideration or that it had been decided until the receipt of the first petition for certiorari in this case. There is no way under our law in which such an *ex parte* proceeding could be determinative of or even relevant to the rights of respondent.



## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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September 1, 1971

FILE COPY

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1971

No. 70-295

FIRST NATIONAL CITY BANK,  
*Petitioner,*

*against*

BANCO NACIONAL DE CUBA,  
*Respondent.*

**REPLY BRIEF OF PETITIONER**

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FIRST NATIONAL CITY BANK,

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**REPLY BRIEF OF PETITIONER**

The importance of the questions presented by this case, and the need to have them settled by this Court, is unquestioned. Respondent has made no effort to minimize the importance of these questions; indeed, its concentration on substantive conclusions emphasizes the need to have this Court take the case and settle the law.

The question now before the Court, on this petition, is whether or not a writ of certiorari should issue. The criteria of Rule 19(1)(b) have been met. The Solicitor General of the United States has urged that the petition be granted. The respondent's Brief in Opposition, however disingenuous its arguments on the merits, supports petitioner's position on this application.

1. *This Court should review the decision of the majority of the court below.* Rule 19(1)(b), Rules of the Supreme Court, provides that the writ may be granted, *inter alia*:

Where a court of appeals . . . has decided an important question of federal law which has not been, but should

be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this court's power of supervision.

(a) The two to one decision below is in direct contravention of the decision in *Banco Nacional de Cuba v. Farr*, 383 F.2d 166 (2d Cir. 1967), *cert. den.* 390 U.S. 956 (*See* Pet. pp. 13, 14). Since the petition was filed, panels of the Second Circuit have twice reaffirmed the propriety of the role of the Executive Branch in determining the applicability *vel non* of the sovereign prerogative. *Heaney v. Government of Spain*, \_\_\_ F.2d \_\_\_ (2d Cir. 1971) (Slip Opinion No. 826, pp. 3971-3981, July 2; September, 1970 Term); *Isbrandtsen Tankers, Inc. v. President of India*, \_\_\_ F.2d \_\_\_ (2d Cir. 1971) (Slip Opinion No. 928, pp. 4559-4564, July 27; September, 1970 Term). In neither case was the decision below cited.

The decision below, in short, is a sport and should not be permitted to stand.

(b) The applicability of the act of state doctrine is an exclusively federal question of serious consequence in the international relations of the United States. The majority below held that the Judicial Branch will undertake to determine matters affecting our international relations without regard for the official opinions formally expressed by the Executive and Legislative Branches. This usurps the proper function of the other branches.

Respondent urges at length that the Judiciary should not heed the explicit pronouncements of the State Department and of Congress in this case: it should be borne in mind that this argument has not been made, nor is it likely to be made, by this respondent or any Communist or Socialist government when the Executive or Legislative intervened in judicial proceedings on its behalf. The

decision below seriously embarrasses our government in the conduct of our foreign affairs. See Memorandum for the United States as Amicus Curiae, pp. 2-4.

(c) The decision below is in conflict with the rule stated by this Court in *National City Bank v. Republic of China*, 348 U.S. 356 (1955) (See Pet. pp. 14-16). Respondent's attempt to distinguish that case as a "sovereign immunity" and not an "act of state" case is a fruitless exercise in semantics. It overlooks the fact that, in so far as a foreign sovereign may take refuge behind the act of state doctrine to prevent judicial scrutiny of the legal effect of its acts, the act of state doctrine is only an aspect of sovereign immunity.

2. Respondent's arguments are neither appropriate at this juncture, nor are they well founded. While it seems clear that respondent's argument of the merits is inappropriate at this time, and we must reserve our response for a hearing on the merits, certain of the more significant omissions and inaccuracies of the respondent's brief should be set right for the record.

(a) As concerns the "various positions" taken by the Department of State with respect to act of state issues, it should be noted that the defendant in *Pons v. Republic of Cuba*, 294 F.2d 925 (D.C. Cir. 1961) was a Cuban national. The Department could scarcely intervene in an action between a foreign government plaintiff and one of its own nationals; nor, where the dispute was between a foreign government and its own national, did any question of breach of international law arise. For a view that the act of state defense should not be available even in those circumstances, see the dissenting opinion of then Circuit Judge Burger, 294 F.2d, at 927.

Also, in *Rich v. Naviera Vacuba, S.A.*, 197 F. Supp. 710 (E.D.Va. 1961), *aff'd*, 295 F.2d 24 (4th Cir. 1961), the opinions both in the district court and in the court of

appeals were solely concerned with the effect to be given to the Department of State's suggestion of sovereign immunity, and its finding that the *Bahia de Nipe* was Cuban Government property. Whether the act of state doctrine was one of the "[q]uestions which merely lurk in the record" seems of no consequence, since the decisions themselves are based on the suggestion of immunity. *Webster v. Fall*, 266 U.S. 507, 511 (1925).

Further, nothing in the *Sabbatino* litigation indicates that the Executive may not determine that the act of state doctrine not be applied to a particular case, as it has here: that litigation was solely concerned with the situation where the Executive chose to remain silent.

These cases therefore indicate that the Department of State has consistently supported the applicability of the act of state doctrine, except where, as here, considerations of foreign policy compelled it to intervene in a particular case to suggest that the doctrine not be applied.

Regardless of its consistency of view, our courts have always deferred to the foreign policy determinations of the Executive, inasmuch as it is that branch of government, and not the Judiciary, that is competent to decide when our foreign relations require the sovereign prerogative to be allowed—or not to be allowed. As Judge Hoffman said in *Rich, supra*, 197 F. Supp., at 724:

The short answer to these contentions is that no policy with respect to international relations is so fixed that it cannot be varied in the wisdom of the Executive. Flexibility, not uniformity, must be the controlling factor in times of strained international relations . . . It is not for a court to question such matters of policy, the reasons for action taken in specific cases, the alleged inconsistent positions asserted and the "findings" of the Executive.

And as Judge Hays observed in the dissent below:

It is not the function of the courts to choose between competing foreign policy considerations . . . [t]he attitude of the United States towards foreign powers must be left, as in *Bernstein*, to the decision of the other branches of government. (Pet. A-12, A-13)

He also said that:

. . . the majority, by applying the act of state doctrine after an independent evaluation of the merits of the State Department's decision, is usurping the same executive prerogative which it is the function of that doctrine to preserve. (Pet. A-12)

(b) It is not a mere "accident of pleading" that the act of state doctrine should not be available to bar adjudication of a counterclaim, pursuant to the rule of *Republic of China*: it is the essence of the exception that the sovereign itself has instituted the suit and that "fair play" requires that the special prerogative be denied, to the extent of the amount claimed by the sovereign.

(c) Respondent misrepresents the legislative history of the Hickenlooper Amendment. The clear language of the statute makes it applicable to petitioner's claim against Cuba in this case. The first opinion of the court of appeals to the contrary rested heavily on the testimony of Professor Olmstead, and in seeking review petitioner submitted the letter from Professor Olmstead in contradiction of the testimonial excerpts selected by the court below. That letter (Pet. App. G) is by no means the only legislative history opposed to respondent's limited view of the coverage of the Amendment. See R. B. Liliich, *International Law, 1970 Survey of New York Law*, 22 *Syracuse L. Rev.* 269, 273-277 (1971) and Note, 11 *Va. J. Int'l Law* 406, 411-413 (1971) for an extensive listing of such other legislative history.



(d) Respondent's arguments as to conformity with Rule 13 of the Federal Rules of Civil Procedure and the independence of Banco Nacional from the Cuban governmental structure of which it is an integral part (Resp. Br. pp. 11-15), should not distract this Court from the issue before it. The short answer is that in the transactions out of which this case arose, Banco Nacional acted exclusively as the agent of the Cuban government. Thus, on the "transactional test" to which respondent refers at page 14 of its brief, the inevitable conclusion, as found by the district court, and not affected by the court of appeals, is that "[t]here is no serious question that the Government of Cuba and Banco Nacional are one and the same for purposes of this litigation". Pet. App. E-4 (Bryan, J.).

### Conclusion

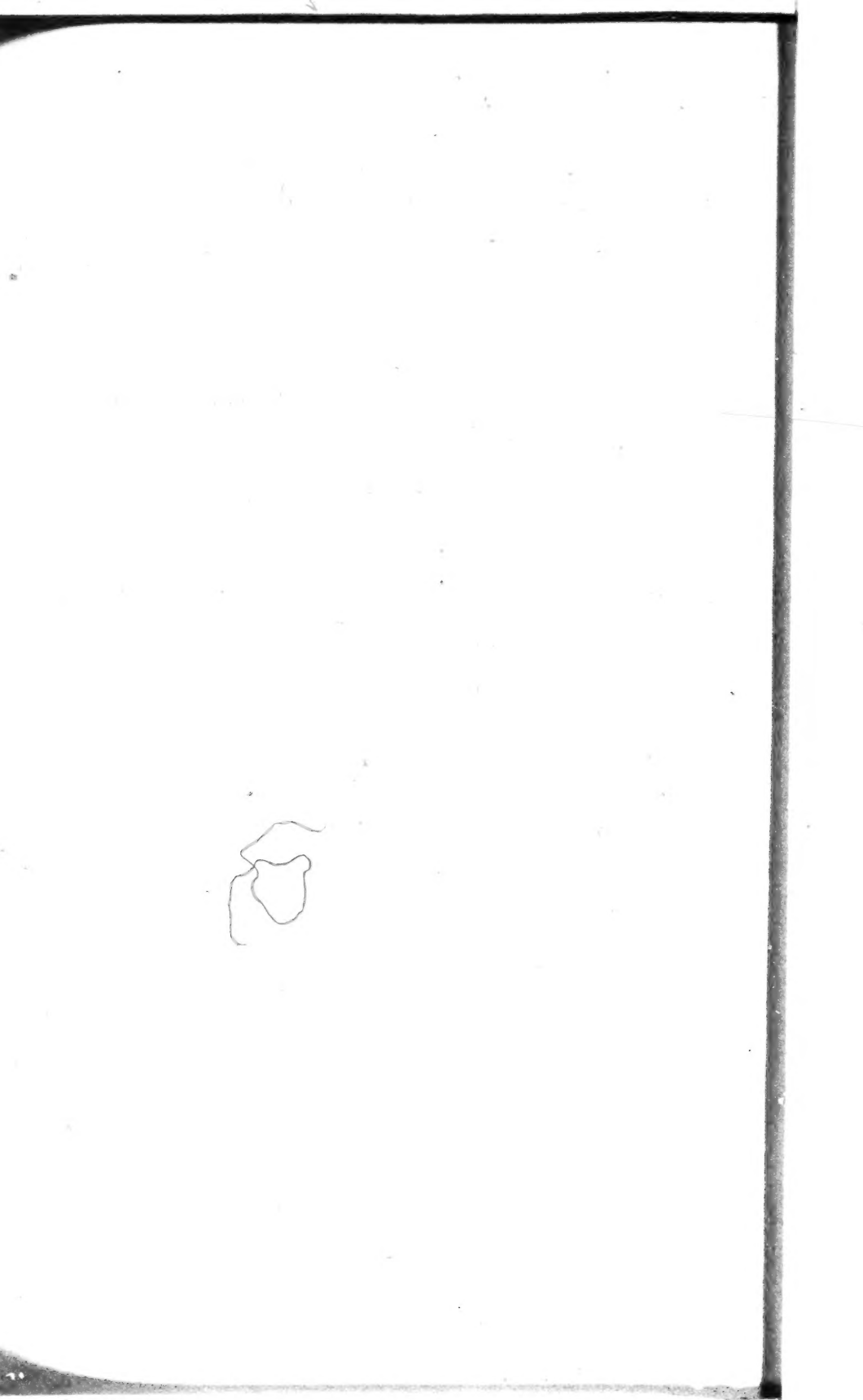
The petition for a writ of certiorari should be granted.

Respectfully submitted,

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September 8, 1971



FILE COPY

No. 70-295

NOV 26 1971

E. ROBERT SEAGER, CL

**In the Supreme Court of the United States**  
**OCTOBER TERM, 1971**

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**FIRST NATIONAL CITY BANK, PETITIONER**

**v.**

**BANCO NACIONAL DE CUBA**

---

**ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE SECOND CIRCUIT**

---

**MEMORANDUM FOR THE UNITED STATES  
AS AMICUS CURIAE**

---

**ERWIN N. GRISWOLD,**  
*Solicitor General,*  
*Department of Justice,*  
*Washington, D.C. 20530.*

---

# **In the Supreme Court of the United States**

OCTOBER TERM, 1971

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No. 70-295

FIRST NATIONAL CITY BANK, PETITIONER

*v.*

BANCO NACIONAL DE CUBA

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*ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE SECOND CIRCUIT*

---

## **MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE**

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This case involves a claim by Banco Nacional de Cuba for excess collateral it had pledged with petitioner to secure a loan, and a counterclaim by petitioner for that excess—conceded to be at least two million dollars—as an offset against the value of petitioner's property in Cuba expropriated by Cuba without compensation. After considering the view of the Department of State that such counterclaims should be permitted in the furtherance of our foreign policy interests,<sup>1</sup> the court of appeals (Judge Hays

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<sup>1</sup> On November 17, 1970, we provided the Court with a letter setting forth the views of the Department of State that important considerations of foreign policy should preclude appli-

dissenting) held that the act of state doctrine barred the counterclaim.

The relevant facts and the procedural history of the case are set forth in the two opinions of the court of appeals and the opinion of the district court which are appended to the petition (Pet. Apps. A, D and E).

1. In the opinion of the United States, the court of appeals' decision seriously impairs the power of the Executive over the control of foreign affairs both by rejecting the considered judgment of the Department of State that the act of state doctrine should not govern this case<sup>2</sup> and by narrowly limiting the *Bernstein* exception to that doctrine (*Bernstein v. N. V. Nederlandsche-Amerikaansche, etc.*, 210 F. 2d 375, 376 (C.A. 2) (see Pet. App. A5-A9)).

In its letter to this Court the Department of State has stated its views in this case in clear terms. It noted the great increase in expropriations over the last decade and the Department's concern with the high vulnerability of certain American firms, es-

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cation of the act of state doctrine to cases like the instant one. See Memorandum submitted by the Solicitor General in *First National City Bank v. Banco Nacional De Cuba*, No. 846, O.T., 1970. On January 25, 1971, the Court granted certiorari, vacated the judgment and remanded the case to the court of appeals "for reconsideration in light of the views of the Department of State" as set forth in that letter. 400 U.S. 1019. The letter is appended to the petition (Pet. App. C).

<sup>2</sup> The act of state doctrine is an exception to the basic principle that United States courts adjudicate cases and controversies including those involving the application of international law "as often as questions of right depending upon it are duly presented for their determination." *The Paquete Habana*, 175 U.S. 677, 700.

pecially financial institutions, to suits by expropriating foreign governments as plaintiffs (Pet. App. C5). And it concluded "that the foreign policy interests of the United States do not require the application of the act of state doctrine to bar adjudication of the validity of a defendant's counterclaim or set-off against the Government of Cuba in these circumstances" (Pet. App. C6). By disregarding this statement of Executive policy involving foreign investment by American firms, the court below has seriously restricted the capacity of the government to assist American investors in securing prompt, adequate and effective compensation for expropriation of American property abroad.

2. Nothing decided in *Banco Nacional De Cuba v. Sabbatino*, 376 U.S. 398, requires such an unyielding application of the act of state doctrine. The Court in *Sabbatino* made clear that it was not "laying down or reaffirming an inflexible and all-encompassing rule \* \* \*." 376 U.S. at 428. Nor did the Court in *Sabbatino* have occasion to pass upon the validity or breadth of the *Bernstein* exception (*id.* at 436). As the Court noted, the Department of State had expressed no views as to the applicability of the act of state doctrine in that case. 376 U.S. at 420. See Brief for the United States in No. 16, O.T., 1963, p. 11. *Sabbatino* accordingly provides no authority for the narrow scope given the *Bernstein* exception by the court below and is in no way dispositive of this case. In contrast to *Sabbatino*, the Department here has made clear its view that application of the act of state doctrine would be inimical to significant foreign policy interests. This considered judgment of the Ex-

ecutive Department charged with responsibility in the field of foreign affairs should be heeded by the courts.

3. Moreover, the considerations of fairness which underly the decision in *National City Bank v. Republic of China*, 348 U.S. 356, are relevant to this case as well. In *Republic of China*, the Court held that a foreign sovereign suing in a federal court waives its immunity as regards counterclaims brought by the defendant. The Court pointed out that in such circumstances the foreign sovereign "wants our law, like any other litigant, but it wants our law free from the claims of justice" (348 U.S. at 361-362); it concluded that in such a setting "fair dealing" outweighs the traditional rule of sovereign immunity (*id.* at 365). So here, an instrumentality of the expropriating foreign sovereign<sup>3</sup> should not be permitted to institute a suit and be immune from setoffs and counterclaims up to the amount of the original claim which could be brought against it were the sovereign an ordinary plaintiff.

The judgment of the court of appeals should be reversed.

Respectfully submitted.

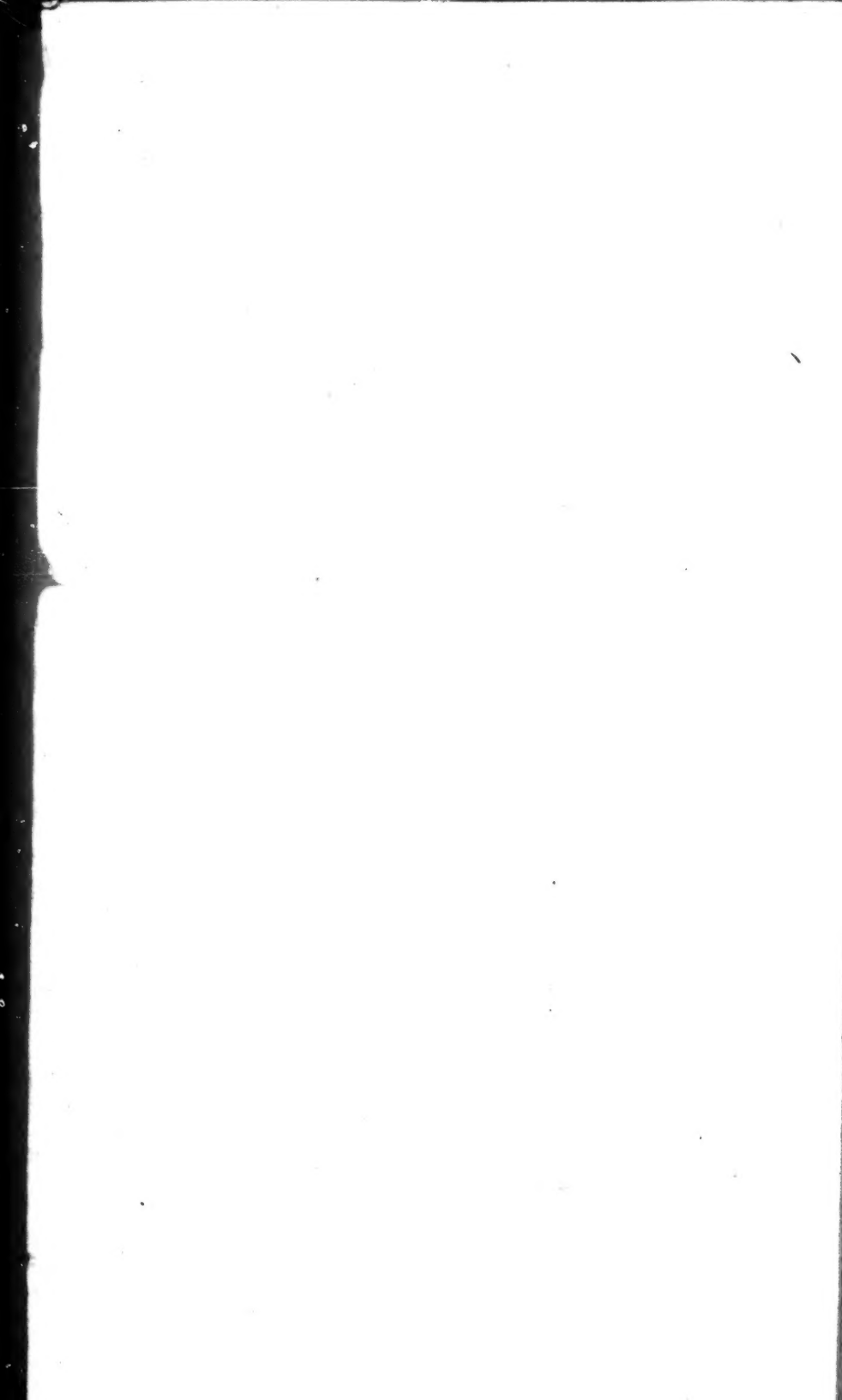
ERWIN N. GRISWOLD,  
*Solicitor General.*

NOVEMBER 1971.

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<sup>3</sup> As the district court pointed out, there "is no serious question that the Government of Cuba and Banco Nacional are one and the same for purposes of this litigation" (Pet. App. E4).





Supreme Court U.S.

FILED

NOV 26 1971

E. ROBERT SEAVER, CLERK

IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1971

\_\_\_\_\_  
No. 70-295  
\_\_\_\_\_

FIRST NATIONAL CITY BANK,

*Petitioner,*

*against*

BANCO NACIONAL DE CUBA,

*Respondent.*

\_\_\_\_\_  
**BRIEF FOR PETITIONER ON WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT**  
\_\_\_\_\_

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# INDEX

	PAGE
Opinions Below -----	1
Jurisdiction -----	2
Questions Presented -----	2
Statutes Involved -----	2
Statement -----	3
Summary of Argument -----	5
Argument -----	6
I. The Act of State Doctrine is No Bar to the Counterclaim -----	6
II. The District Court Correctly Held that Petitioner is Entitled to its Offset -----	16
Conclusion -----	23
Statutes -----	1a
Foreign Assistance Act of 1964, 22 U.S.C. § 2370(e)(1) -----	1a
Foreign Assistance Act of 1964, 22 U.S.C. § 2370(e)(2) (Hickenlooper Amendment) ---	2a
Cuban Law of Nationalization No. 851 -----	3a
Fundamental Law of Cuba -----	6a

## TABLE OF AUTHORITIES

	PAGE
<i>Cases:</i>	
<i>American Banana Co. v. United Fruit Co.</i> , 213 U.S. 347 (1909) -----	9
<i>Anglo-Iranian Oil Co. v. Jaffrate</i> , [1953] 1 W.L.R. 246 -----	6, 13
<i>Banco Nacional de Cuba v. Farr</i> , 383 F.2d 166 (2d Cir. 1967), cert. den. 390 U.S. 956 ----	6, 11, 13, 17, 18, 21
<i>Banco Nacional de Cuba v. Farr</i> , 243 F. Supp. 957 (S.D.N.Y. 1965) -----	11, 17, 18
<i>Banco Nacional de Cuba v. Sabbatino</i> , 376 U.S. 398 (1964) -----	9, 10, 11, 13, 14, 17, 18, 19
<i>Banco Nacional de Cuba v. Sabbatino</i> , 307 F. 2d 845 (2d Cir. 1962) -----	17, 18, 21
<i>Banco Nacional de Cuba v. Sabbatino</i> , 193 F. Supp. 375 (S.D.N.Y. 1961) -----	17, 18
<i>Bernstein v. N.V. Nederlandsche-Amerikaan-</i> <i>sche, etc.</i> , 173 F. 2d 71 (2d Cir. 1949) -----	6
<i>Bernstein v. N.V. Nederlandsche-Amerikaan-</i> <i>sche, etc.</i> , 210 F. 2d 375 (2d Cir. 1954) -----	6
<i>Ex parte Peru</i> , 318 U.S. 578 (1943) -----	14
<i>French v. Banco Nacional de Cuba</i> , 23 N.Y. 2d 46 (1968) -----	22
<i>Heaney v. Government of Spain</i> , 445 F.2d 501 (2d Cir. 1971) -----	16
<i>Hudson v. Guestier</i> , 4 Cranch 293 (1808) -----	9
<i>In the Matter of the Claim of First National City Bank</i> , F.C.S.C. Dec. No. CU-3835, November 14, 1969 -----	3, 5
<i>Isbrandtsen Tankers, Inc. v. President of India</i> , 446 F.2d 1198 (2d Cir. 1971) -----	16
<i>L'Invincible</i> , 1 Wheat. 238 (1815) -----	9
<i>National City Bank v. Republic of China</i> , 348 U.S. 356 (1955) -----	2, 8, 9, 10, 16

	PAGE
<i>Oetjen v. Central Leather Co.</i> , 246 U.S. 304 (1918) -----	9, 14
<i>The Paquete Habana</i> , 175 U.S. 677 (1900) -----	20
<i>Pons v. Republic of Cuba</i> , 294 F. 2d 925 (D.C. Cir. 1961), <i>cert. den.</i> 368 U.S. 960 (1962) -----	18
<i>Rabinowitz v. Kennedy</i> , 376 U.S. 605 (1964) --	22
<i>Republic of Mexico v. Hoffman</i> , 324 U.S. 495 (1940) -----	14, 15
<i>Ricaud v. American Metal Co.</i> , 246 U.S. 304 (1918) -----	9
<i>Rich v. Naviera Vacuba, S.A.</i> , 295 F.2d 24 (4th Cir. 1961) -----	14
<i>Russian Volunteer Fleet v. United States</i> , 282 U.S. 481 (1931) -----	13
<i>The Santissima Trinidad</i> , 7 Wheat. 283 (1822)	9
<i>The Schooner Exchange v. McFaddon</i> , 7 Cranch 116 (1812) -----	9
<i>Shapleigh v. Meir</i> , 299 U.S. 463 (1937) -----	9
<i>Underhill v. Hernandez</i> , 168 U.S. 250 (1897) --	9
<i>United States v. Belmont</i> , 301 U.S. 324 (1936)	9
<i>United States v. Pink</i> , 315 U.S. 203 (1942) -----	9
<i>Victory Transport, Inc. v. Comisaria General</i> , 336 F. 2d 354 (2d Cir. 1964), <i>cert. den.</i> 381 U.S. 934 (1965) -----	16
<i>Ware v. Hylton</i> , 3 Dall. 199 (1796) -----	9

#### Statutes:

Amendment V, United States Constitution -----	19
Amendment XIV, United States Constitution --	19
Cuban Law of Nationalization No. 851 -----	3, 6, 7, 10, 13, 17, 19
Foreign Assistance Act of 1961, 22 U.S.C. § 2370(e) -----	2, 6, 8, 11, 12, 16, 18, 20
Fundamental Law of Cuba, Art. 24 -----	3, 10, 19
International Claims Settlement Act of 1949, 22 U.S.C. §§ 1621 <i>et seq.</i> -----	3

*Miscellaneous:*

43 Dept. of State Bull. 171 .....	17
43 Dept. of State Bull. 316 .....	17
43 Dept. of State Bull. 603 .....	17
Dawson & Weston, <i>Prompt, Adequate and Effective: A Universal Standard of Compensation?</i> , 30 Ford L. Rev. 727 (1962) .....	19
Fachiri, <i>Expropriations &amp; International Law</i> , [1925] Brit. Y.B. Int'l L. 15 .....	19
Friedman, <i>Expropriation in International Law</i> , 206 (1953) .....	19
Hackworth, <i>Digest of International Law</i> , Vol. III, 656-662 .....	19, 20
Hyde, <i>International Law Chiefly as Interpreted and Applied by the United States</i> , 710-25 (2d rev. ed. 1947) .....	19
Lillich, <i>International Law, 1970 Survey of New York Law</i> , 22 Syracuse L. Rev. 269-80 (1971) .....	12
Malawer, <i>The Act of State Doctrine and the City Bank Case: A Proper Role for the Judiciary in the World Public Order</i> , 1 Balt. L. Rev. 70 (1971) .....	12
Note, 11 Va. J. Int'l Law 406 (1971) .....	12
Restatement (Second), <i>Foreign Relations Law of the United States</i> , §§ 185-192 .....	19
Rule 19, <i>Rules of the Supreme Court</i> .....	13
Stevenson Letter, 10 Int'l Legal Mat'l 89 (1971) (Appendix p. 82) .....	2, 4, 6, 7, 8, 14, 16
Williams, <i>International Law and the Property of Aliens</i> , [1928] Brit. Y.B. Int'l L. 1 .....	19
Wortley, <i>Expropriation in Public International Law</i> , 33, 36 (1959) .....	19



IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1971

---

No. 70-295

---

FIRST NATIONAL CITY BANK,

*Petitioner.*

*against*

BANCO NACIONAL DE CUBA,

*Respondent.*

---

**BRIEF FOR PETITIONER ON WRIT OF  
CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE  
SECOND CIRCUIT**

First National City Bank (formerly known and sued herein as The First National City Bank of New York) was granted certiorari, on October 12, 1971, to review the judgment of the United States Court of Appeals for the Second Circuit on remand, reinstating its earlier judgment, which reversed a final order and judgment of the United States District Court for the Southern District of New York granting summary judgment for petitioner and dismissing the action on the merits. This Court vacated that earlier judgment of the court of appeals and directed reconsideration in light of the views of the Department of State expressed in its letter dated November 17, 1970.

**Opinions Below**

The majority and dissenting opinions in the court of appeals are reported at 442 F.2d 530. The first order of this

Court is reported at 400 U.S. 1019. The earlier opinion of the court of appeals is reported at 431 F.2d 394, and the opinion of the district court is reported at 270 F. Supp. 1004.

### **Jurisdiction**

The judgment of the court of appeals was entered April 27, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

### **Questions Presented**

1. Shall a court in the United States decline on the ground of the federal act of state doctrine to permit a United States national, as defendant, to offset against the claim of a foreign government plaintiff its claim for compensation for property confiscated by that foreign government, notwithstanding the decision of this Court in *National City Bank v. Republic of China*, 348 U. S. 356 (1955), the provisions of Section 2370(e) of the Foreign Assistance Act of 1961, as amended, and the declaration of the Executive Branch, based upon its determination of the foreign policy interests of the United States, that the act of state doctrine should not be applied in this or similar cases?

2. Was the district court correct in its determination that the Cuban government's seizure of the property of a United States national, pursuant to Cuban Law No. 851, was in violation of international law, that the United States national was entitled to compensation for the property confiscated by Cuba, and that the United States national is lawfully entitled to offset that claim for compensation against the claims by the Cuban government or its instrumentality in an action instituted by such Cuban government instrumentality in the courts of the United States?

### **Statutes Involved**

The Foreign Assistance Act of 1964, as amended, 22 U.S.C. § 2370(e)(1), (2) (Hickenlooper Amendment), Law

No. 851 of Cuba, and Fundamental Law of Cuba, Article 24, are set forth following this brief.

### Statement

Petitioner, a national banking association, has a claim against the government of Cuba, based on the taking of petitioner's property in September 1960. The validity of this claim was determined by the Foreign Claims Settlement Commission (the "Commission") pursuant to Title V of the International Claims Settlement Act of 1949, as amended, and the Commission determined the amount of the claim to be \$4,863,731.04 plus interest after deduction of petitioner's recoveries against Cuba, including the offset hereafter described. *In the Matter of the Claim of First National City Bank*, F.C.S.C. Dec. No. CU-3835, November 14, 1969.

Respondent is an instrumentality of the government of Cuba acting in this case for and on behalf of Cuba\*; for purposes of this litigation the plaintiff-respondent is the government of Cuba. It commenced this action in the District Court for the Southern District of New York to recover \$2,347,000, alleging federal jurisdiction under 28 U.S.C. § 1332. The claims arose out of petitioner's withholding from respondent the surplus proceeds of Cuban collateral originally pledged as security on a loan made by petitioner to Cuban government instrumentalities.

Petitioner asserted an offset in the amount of the value of its seized Cuban property. The district court, Judge Bryan, held this offset proper; and, upon the stipulation of the parties that the offset exceeded the amount of respondent's claim, entered judgment for petitioner.

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\* The district court found that "There is no serious question that the Government of Cuba and Banco Nacional are one and the same for purposes of this litigation". (Appendix ("A."), p. 37) Respondent "at various times has argued that defendant's (petitioner's) claim against the Cuban government cannot be asserted against Banco Nacional, an entirely separate entity". (A. p. 37, n. 3) This argument was renewed on appeal, but the court below did not pass on it.

Respondent appealed and the court of appeals, holding that allowance of the offset was error, reversed.

On petition to this Court for a writ of certiorari, the Solicitor General filed a memorandum transmitting a letter expressing the Department of State's view that the act of state doctrine should not be applied to bar consideration of the counterclaim in this or like cases. (A. p. 82) This Court granted the writ, vacated the judgment of the court of appeals and remanded the case for reconsideration in light of the views expressed by the Department of State. On remand, the majority of the same panel of the court below (Judge Hays dissenting) reinstated its earlier judgment notwithstanding the Department's views. The majority opinion by Chief Judge Lumbard (in which District Judge Blumenfeld, sitting by designation, concurred) appears at A. p. 73; the dissenting opinion by Circuit Judge Hays at A. p. 86.

There is no dispute as to the facts. From August, 1915 until September, 1960, petitioner maintained branch offices in Cuba, pursuant to Section 25 of the Federal Reserve Act and Cuban law (A. pp. 19, 20). On September 16, 1960, petitioner operated eleven branches in Cuba (A. pp. 19, 29).

In 1958, Cuba applied to petitioner for a loan for government purposes. Petitioner made the loan, in the initial principal amount of \$15,000,000, secured by obligations of the United States Government and the International Bank for Reconstruction and Development (the "collateral"). The loan was made, and the collateral received in pledge, at petitioner's head office in New York City on July 8, 1958.

At the request of Cuba, the original one year maturity was extended for another year. In July 1960, Cuba proposed to pay \$5,000,000 on account of principal, against release to it of a proportionate amount of the collateral (which was done), and to defer payment of the balance

for a further period of one year from July 8, 1960. Petitioner agreed to this proposal upon the express proviso that the continuance of the loan was predicated upon a continuance of conditions then existing in Cuba. Documentation covering the extension was sent to Cuba for execution, but was never returned. (Record ("R"): Notice of Motion of Defendant for Summary Judgment ("Def. Mot."), Supporting Affidavit of C. Boise Nourse, p. 5.)

More or less simultaneously, Cuba enacted Law of Nationalization No. 851 (*infra*, p. 2a) and thereafter on September 16, 1960, the Cuban government seized petitioner's branches in Cuba and turned them over to respondent, which is still in possession and control of those properties. The Fundamental Law of Cuba (*infra*, p. 6a) and Cuban Law No. 851 (*infra*, p. 3a) provide that compensation shall be paid for property taken by the Cuban government, but no compensation has been paid to petitioner.

Petitioner promptly exercised its rights to sell the collateral for the \$10,000,000 loan, which yielded proceeds of \$11,892,448.41, according to petitioner's records (R: *id.*, p. 7), which was applied to principal and interest then due, leaving a surplus of \$1,810,081.51. Although the amount of petitioner's offset was in dispute, the parties have stipulated, for the purpose of this action, that the amount of the petitioner's counterclaim exceeds the amount of the surplus collateral. (The Commission later determined the value of the seized branches to be \$9,510,000.00.)

Petitioner's claim is asserted as a defensive counterclaim only; that is, as an offset against the claim for surplus collateral. Petitioner seeks no affirmative judgment against Cuba in this action.

### Summary of Argument

The court below erred in treating the act of state doctrine as a bar to adjudication of the validity of petitioner's

offset and defensive counterclaim. The act of state doctrine is not applicable to a defense that offsets a claim for money due from a sovereign against a money claim by a sovereign. The act of state doctrine is not available to a sovereign, as a defense to a counterclaim in the courts of the United States, when the Legislative and Executive branches of our government have explicitly declared that the doctrine should not be applied.

As the decision of the district court, on the merits, was permissible and correct, the judgment of that court should be reinstated and affirmed.

## Argument

### I

#### **The Act of State Doctrine is No Bar to the Counterclaim.**

In this action, petitioner has pleaded separate defenses and set-offs, asserted as counterclaims, that set forth independent, but consistent theories. One of these calls in question the validity of Cuban Law 851 in its application to petitioner. The other does not. The former asserts that Cuba's seizure of petitioner's property was unlawful. The latter asserts that the consequence of Cuba's seizure of petitioner's property, putting aside the question as to validity of that seizure, was an obligation to pay fair compensation for the property taken and retained. Absent an applicable exception<sup>1</sup>, the act of state doctrine bars con-

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<sup>1</sup> E.g., *Banco Nacional de Cuba v. Farr*, 383 F.2d 166 (2d Cir. 1967) cert. den. 390 U.S. 956; *Bernstein v. N.V. Nederlandsche-Amerikaansche, etc.*, 210 F.2d 375 (2d Cir. 1954); Stevenson Letter, 10 Int'l Legal Mat. 89 (1971) (A. p. 82); Hickenlooper Amendment, 22 U.S.C. § 2370(e)(2) (*infra*, p. 2a); *Anglo-Iranian Oil Co. v. Jaffrate*, [1953] 1 W.L.R. 246 (*The Rose Mary*). As hereafter shown, *infra* pp. 11-15, these exceptions are applicable to this case.

sideration of petitioner's claim that Cuban Law 851 was invalid and the seizures thereunder wrongful. The act of state doctrine does not bar consideration of the legitimacy of petitioner's claim that the Cuban government is indebted to it in an amount such that the Cuban government should take nothing in this action.

The district court adjudicated the merits of petitioner's counterclaim against the Cuban government and held that the petitioner was entitled to judgment, dismissing respondent's claim against it. (A. p. 47) In its review of the district court's judgment, the court of appeals did not reach the merits of the controversy and made no substantive determination. It held that the act of state doctrine was a bar to consideration of the counterclaim, and it therefore reversed the judgment of the district court and directed the entry of judgment for the respondent in the amount of its claim free of any defenses, offsets or counterclaims. The parties have stipulated that the amount of the counterclaim exceeds the amount of the claim. (A. p. 4)

Petitioner applied to this Court for a writ of certiorari. Upon that application the Solicitor General of the United States transmitted to this Court a statement setting forth the views of the Department of State which were, in substance, that the court of appeals need not and should not have applied the act of state doctrine as a bar to adjudication of petitioner's counterclaims. This Court granted the petition and remanded the case to the court of appeals for reconsideration in the light of the views expressed by the Department of State. (A. p. 71)

Upon such reconsideration a majority of the panel below adhered to the original determination. Judge Hays dissented on the ground that the majority ignored "both the exception to the act of state doctrine in *Bernstein*, and the fundamental purpose of the doctrine itself". (A. p. 86)



The decision of the majority in the court below was erroneous for the following reasons:

(1) In a case instituted in the United States courts by a foreign government, the act of state doctrine has no application to a defensive counterclaim that does not call in question title to property transferred in the territory of a foreign sovereign nor depend solely upon the invalidity of an act done or permitted by such a sovereign within such territory;

(2) Congress has declared that a foreign government may not use the act of state doctrine as a defense, even against a challenge to the validity of that government's acts, in a case where the claim against that government arises out of a confiscation or taking (after January 1, 1959) in violation of the principles of international law; and

(3) The Executive Branch has found that application of the act of state doctrine is not required by the foreign policy interests of the United States and has formally represented to this Court that the doctrine should not be applied to bar consideration of a counterclaim or set-off against the government of Cuba in this or like cases.

1. *The Act of State Doctrine is not Applicable to Cases of this Nature.* This court decided in *National City Bank v. Republic of China*, 348 U.S. 356 (1955), that considerations of fairness and equity require allowance of a counterclaim in reduction or extinguishment of the claim of a foreign sovereign suing in our courts. Petitioner's Third Complete Defense, Setoff, and Counterclaim alleges that Cuba is indebted to it in an amount substantially in excess of the amount claimed in this action (A. pp. 23-24). This is precisely the kind of counterclaim which petitioner asserted and this Court allowed in *Republic of China*.

The act of state doctrine has no application to such a counterclaim. The act of state doctrine, as stated by Mr. Justice Harlan in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964), creates a presumption that foreign acts of state are valid and therefore precludes consideration of a claim or argument that depends upon a showing of invalidity of such act.

A careful reading of the federal cases applying the act of state doctrine shows that, in the main, the issue was title to specific property.<sup>2</sup> In those cases the courts recognized title derived through the foreign act of state where the act occurred while the property was in the foreign jurisdiction, and held that the act of state doctrine precluded attack upon the validity of the foreign act upon which title depended. No cases have been found precluding a party, under the act of state doctrine, from enforcing the defaulted obligation of a foreign sovereign.<sup>3</sup> Sovereign immunity from suit, if claimed by the sovereign, may, of course, prevent enforcement of the sovereign's obligation in our courts. That bar is not present in this case, since Cuba, by bringing the action, has waived its immunity to the extent of its claim and has subjected itself to the jurisdiction of the court upon a defensive counterclaim.

*Republic of China* is directly in point. There, in an action by a foreign sovereign, counterclaims were permit-

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<sup>2</sup> *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964); *United States v. Pink*, 315 U.S. 203 (1942); *United States v. Belmont*, 301 U.S. 324 (1936); *Shapleigh v. Mier*, 299 U.S. 468 (1937); *Ricaud v. American Metal Co.*, 246 U.S. 304 (1918); *Oetjen v. Central Leather Co.*, 246 U.S. 297 (1918); *The Santissima Trinidad*, 7 Wheat. 283 (1822); *L'Invincible*, 1 Wheat. 238 (1816); *The Schooner Exchange v. McFaddon*, 7 Cranch 116 (1812); *Hudson v. Guestier*, 4 Cranch 293 (1808); *Ware v. Hylton*, 3 Dall. 199 (1796); see 376 U.S., at 416, 417.

<sup>3</sup> *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909) and *Underhill v. Hernandez*, 168 U.S. 250 (1897) did not involve title to property, nor a defaulted obligation of a foreign sovereign, nor was a foreign sovereign a party in either case.

ted, based upon repudiations by the foreign sovereign of its obligations on unrelated debts.

Counsel for respondent have gone to great length in the court below to make the point that the words "act of state" do not appear in any of the briefs or opinions in *Republic of China*. This is quite understandable, since the act of state doctrine was not involved in that case. Nor is it in this one.

The undisputed facts upon which petitioner's counterclaim is based are that the Cuban government took petitioner's property, the value of which is stipulated for purposes of this action, and failed to pay that value, or any compensation, to petitioner. That value is, and for more than eleven years, has been due and owing to petitioner. Petitioner does not attempt to recover that amount in this action, but it does seek, consistently with the judgment in *Republic of China*, to curtail respondent's recovery in this action. The essence of petitioner's position is that it is entitled, in fairness, to reduce the amount respondent would take from it in this action by the amount respondent has already taken.

Adjudication of petitioner's right to set-off the conceded monetary value of its property against the monetary claim made against it in this action, does not call in question the validity of any Cuban law or conduct.<sup>4</sup> Rather, it gives effect to specific Cuban decrees that explicitly recognize the obligation to pay. (Fundamental Law of Cuba, Art. 24, *infra*, p. 6a; Cuban Law No. 851, *infra*, p. 3a.) Adjudication of the right to setoff raises none of the political questions discussed in *Sabbatino*. Cf. *infra*, pp. 13-15. It

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<sup>4</sup> Admittedly, it denies effect to Cuba's failure and presumed refusal to pay for what it took, but that was the consequence in *Republic of China*, and respondent itself has said "There may be some question as to whether a simple failure to meet a debt, unaccompanied by any specific act or repudiation, constitutes an Act of State. . . ." Brief in Opposition to Second Petition for Certiorari, p. 11, n. 9.

clouds no title to property now or hereafter moving in the channels of international trade, nor does it call in question respondent's title and right to possession of the Cuban properties that formerly belonged to petitioner and are now held and enjoyed by respondent.

The court below erred in holding that the act of state doctrine barred consideration of petitioner's claim that its right to compensation diminished respondent's claim to recovery in this case. For the reasons set forth in Point II of this brief, the district court correctly determined the validity of petitioner's right to set-off its claim against respondent's claim.

2. *Congress has Declared that the Courts of this Country shall Not, on the Ground of the Act of State Doctrine, Refrain from Adjudicating the Merits of a Claim Arising out of a Violation of International Law.* Following the decision of this Court in *Sabbatino*, Congress addressed itself to the act of state doctrine by amending the Foreign Assistance Act of 1961. "Congress there declared that the courts of this country should not refrain, on the ground of the act of state doctrine, from determining the merits in cases involving a confiscation after January 1, 1959, by act of a foreign state 'in violation of the principles of international law, including the principles of compensation'" (Bryan, J.) (A. p. 39). The application and the constitutionality of that declaration was promptly tested in the *Sabbatino* litigation itself. The district court held that the amendment was constitutional, notwithstanding the prior application of the act of state doctrine. It examined the validity of Cuban Law No. 851 and held that it was in violation of international law. The Second Circuit affirmed, and this Court denied certiorari. *Banco Nacional de Cuba v. Farr*, 383 F.2d 166 (2d Cir. 1967), cert. den. 390 U.S. 956.

Accordingly, Judge Bryan, who had theretofore held this case in abeyance for nearly six years, properly regarded

himself as under a Congressional directive to adjudicate petitioner's counterclaim on the merits; he held, on the merits, that petitioner was lawfully entitled to offset against respondent's claim in this case the amount due and owing to it from the Cuban government as compensation for its seized Cuban properties. The court below found no error in the district court's analysis of the legal consequences of respondent's confiscations. It confined itself to a holding that the Congressional declaration as to the act of state doctrine was not available to this petitioner in this case, accepting the fact that the taking of petitioner's property was in violation of international law, a condition specified by Congress and found by the district court. The court below construed the words "claim of title or other right to property" as if they referred only to *tangible personal* property that had found its way into the United States. This strained interpretation, which has been severely criticized,<sup>5</sup> will produce an anomaly in the law and an inconsistency of decision within the same circuit, if it is left uncorrected. So read, the statute would require adjudication on the merits only on claims asserted by the owners of particular commodities such as sugar, tobacco or oil, or the proceeds of any of them, and would deny justice to the owners of other classes of property, such as real estate, negotiable instruments or intangibles, or the proceeds of any of them. Any such discriminatory enactment would be constitutionally unsound as irrational, a denial of equal treatment to former owners of property in Cuba and a denial of due process of law to petitioner. The court of appeals erred in interpolating by implication a condition which, to say the least,

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<sup>5</sup> See Lillich, *International Law, 1970 Survey of New York Law*, 22 Syracuse L. Rev. 269-80 (1971); Note, 11 Va. J. Int'l L. 406 (1971); Malawer, *The Act of State Doctrine and the City Bank Case: A Proper Role for the Judiciary in the World Public Order*, 1 Balt. L. Rev. 70 (1971).

would raise a grave question as to the constitutional validity of the statute. *Russian Volunteer Fleet v. United States*, 282 U.S. 481 (1931), at 492.

The court below's reading of the Hickenlooper Amendment should be corrected by this Court. The court below's decision in *Banco Nacional de Cuba v. Farr*, 383 F.2d 166 (2d Cir. 1967), *cert. den.* 390 U.S. 956, is a holding that Cuban Law No. 851 violated international law and warranted judicial relief to a United States national aggrieved by Cuban action under it.<sup>6</sup> The decision of the same court in this case now denies judicial relief to a United States national aggrieved by action under that same Cuban law, on the ground that the act of state doctrine precludes judicial examination. This pushes the act of state doctrine beyond the bounds of rationality, and is such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. Rule 19(1)(b), Rules of the Supreme Court of the United States.

3. *The Act of State Doctrine should not be Applied Where to do so Usurps the Executive Prerogative in the Conduct of Foreign Affairs.* The issue of whether a court of the United States should or should not determine the validity of a foreign act of state bears "importantly on the conduct of the country's foreign relations and more particularly on the proper role of the Judicial Branch in this sensitive area." *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964), at 407.

While the act of state doctrine is a judicial rule of self-restraint, it was developed and is applied for political considerations. Justice Harlan carefully noted that the doctrine is not prescribed by international law nor by the

<sup>6</sup> *Accord, Anglo-Iranian Oil Co. v. Jaffrate*, [1953] 1 W.L.R. 246 (*The Rose Mary*).



Constitution, and its "constitutional underpinnings" rest upon "the basic relationship between branches of government in a system of separation of powers", 376 U.S., at 423. The doctrine "concerns the competency of dissimilar institutions to make and implement particular kinds of decisions in the area of international relations", 376 U.S., at 423. The Constitution "does not irrevocably remove from the judiciary the capacity to review the validity of foreign acts of state", 376 U.S., at 423. Deference due the political branches of government compels abstention where such review might encroach upon the prerogatives of those to whom the Constitution entrusts the conduct of foreign affairs. But when the political arm of government has made a formal declaration in the area of its competence, abstention is neither required nor justifiable. *Ex parte Peru*, 318 U.S. 578 (1943); *Republic of Mexico v. Hoffman*, 324 U.S. 495 (1940).

Judge Hays was, therefore, quite correct in his statement that the majority below, "by applying the act of state doctrine after an independent evaluation of the merits of the State Department's decision, is usurping the same executive prerogative which it is the function of that doctrine to preserve." (A. p. 87)

That the act of state doctrine is an incident of Executive power is beyond doubt. Even though self-imposed, it is a restraint on Judicial power, and the fundamental purpose of this restraint is to preserve the Executive prerogative in the field of foreign policy. (A. p. 87; cf. *Ex parte Peru*, *supra*; *Republic of Mexico*, *supra*; *Rich v. Naviera Vacuba, S.A.*, 295 F.2d 24 (4th Cir. 1961); *Oetjen v. Central Leather Co.* 246 U.S. 297, at 302). It is true that judicial abstention in aid of this Executive prerogative may result in indirect benefits to a foreign government, but that is a casual consequence and not a primary purpose of the act of state doctrine. The Government of the United States



is the beneficiary of the doctrine; it is a perversion of constitutional principles for a court in the United States, as did the majority of the panel below, to apply that doctrine for the benefit of a foreign government in derogation of our Government's explicit findings and declaration as to the foreign policy of the United States.

In the circumstances of this case, the application of the act of state doctrine would create an unacceptable conflict between the Judicial and Executive branches of government. As was said by Mr. Chief Justice Stone in *Republic of Mexico v. Hoffman*, *supra*:

It is not for the courts to deny an immunity which our government has seen fit to allow, or to allow an immunity on new grounds which the government has not seen fit to recognize. (324 U.S., at 35.)

And, as observed by Mr. Justice Frankfurter, concurring, in the same case:

It is my view, in short, that courts should not disclaim jurisdiction which otherwise belongs to them . . . except when "the department of the government charged with the conduct of our foreign relations," or of course Congress, explicitly asserts that the proper conduct of these relations calls for judicial abstention. Thereby responsibility for the conduct of our foreign relations will be placed where power lies. And unless constrained by the established policy of our State Department, courts will best discharge their responsibility by enforcement of the regular judicial processes.

In summary, the court below erroneously applied the act of state doctrine because, to the extent that petitioner's counterclaim is based upon a debt of Cuba to it, the doctrine has no application, and to the extent that the doctrine might be applicable, its effect has been nullified by the explicit

pronouncements of the Legislative and Executive branches of our government.<sup>7</sup>

## II

### **The District Court Correctly Held that Petitioner is Entitled to its Offset.**

This case was submitted to the district court in 1961 on cross motions for summary judgment. While the evidentiary material submitted by both sides, consisting of affidavits and exhibits, was voluminous, there is no dispute as to the facts. (Respondent's Brief in Opposition to Second Petition for Certiorari, p. 2.) Throughout the long history of this litigation, the parties have confined their differences to the inferences and legal consequences to be drawn from facts that are not in dispute.

The findings and determination of the district court were, in consequence, essentially simple. That court found and held that the Cuban government seized and retained petitioner's property in Cuba and that petitioner was lawfully entitled to offset the value of the property so taken against the claim of the respondent asserted in this case. (A. p. 47) The parties have stipulated that if the defendant [petitioner] is lawfully entitled to the offset claimed by it

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<sup>7</sup> In *Isbrandtsen Tankers, Inc. v. President of India*, 446 F.2d 1198 (2d Cir. 1971) the Second Circuit affirmed the role of the State Department in determining whether or not a given sovereign could be held responsible for its obligations. In *President of India*, it was held that the suggestion of immunity by the Department of State overrode the sovereign's otherwise applicable waiver of immunity, citing *Victory Transport, Inc. v. Comisaria General*, 336 F.2d 354 (2d Cir. 1964), *cert. den.*, 381 U.S. 934 (1965), and *National City Bank of New York v. Republic of China*, 348 U.S. 356 (1955). Also see *Heaney v. Government of Spain*, 445 F.2d 501 (2d Cir. 1971). In neither *President of India* nor *Heaney* did the court below cite this case.

the amount thereof is such that plaintiff [respondent] will take nothing in this action. (A. p. 4.).

Throughout this litigation respondent has sought by two devices to evade the conclusion reached by the district court. The first is that the Cuban government's confiscation of the property of United States nationals is an exercise of sovereignty and therefore gives rise to no legitimate claim by deprived United States nationals either for return of their property or for compensation. The second is that respondent is so far divorced from the Cuban government as to insulate its claim, for the proceeds of collateral pledged to secure a loan to the Cuban government, from a counter-claim or offset against that government.

1. *The District Court Correctly Determined that Petitioner has a Valid Counterclaim against Cuba.* The essence of the district court's opinion was that Cuba's confiscation of American property, including that of this petitioner, violated international law and that petitioner was entitled to indemnity for its loss. This conclusion by the district court was consistent with the formal protests of our Government, 43 Dept. of State Bull. 603, 604; 43 Dept. of State Bull. 171; 43 Dept. of State Bull. 316, and was dictated by the judgments of the Court of Appeals for the Second Circuit in the *Sabbatino* litigation. *Banco Nacional de Cuba v. Sabbatino*, 307 F.2d 845 (2d Cir. 1962) *rev'd*, *o.g.* 376 U.S. 398 (1964); *Banco Nacional de Cuba v. Farr*, 383 F.2d 166 (2d Cir. 1967), *cert. den.* 390 U.S. 956. The Cuban confiscation involved in this case, as in the *Sabbatino* litigation, in other cases in the Second Circuit<sup>8</sup>, and in the claims filed with the Foreign Claims Settlement Commission, were implementations of Cuban Law 851. Every court in the United States that has had occasion to examine Cuban Law 851 has found that the seizures of the property of United States nationals pursuant to that law were in violation of international law. No court in the United States

<sup>8</sup> E.g. *Banco Nacional de Cuba v. The Chase Manhattan Bank*, S.D.N.Y., 60 Civ. 4663; *see* A. p. 34.

has held or suggested that such Cuban confiscations were a lawful exercise of sovereign prerogative.<sup>9</sup>

In the *Sabbatino* litigation, the District Court for the Southern District of New York held the Cuban action to be in violation of international law, 193 F. Supp. 375; the Second Circuit, in an illuminating and exhaustive opinion, affirmed this conclusion, 307 F.2d 845. This Court did not disturb those determinations; it held only that in the circumstances of the *Sabbatino* litigation and in the absence of any contrary indication by the Executive or Legislative branches, the act of state doctrine made adjudication inappropriate. Following enactment of the amendments to the Foreign Assistance Act of 1964, 22 U.S.C. § 2370(e), as amended, 79 Stat. 658-59 (Sept. 6, 1965), these same Cuban confiscations, in the same context, were reexamined by the Southern District and the Second Circuit. Upon such re-examination the original determination of invalidity under international law was reaffirmed, and was left undisturbed by this Court. *Banco Nacional de Cuba v. Farr*, 383 F.2d 166 (2d. Cir. 1967), *cert. den.* 390 U.S. 956.

Moreover, this case presents circumstances that were not present in *Sabbatino*. Petitioner's right to compensation for its property is supported by the determination that the Cuban taking was in violation of international law, but its right to compensation is not dependent solely upon the invalidity of Cuban Law 851. The right to compensation for property taken by a sovereign is a universal proposi-

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<sup>9</sup> In *Pons v. Republic of Cuba*, 294 F.2d 925 (D.C. Cir. 1961), *cert. den.* 368 U.S. 960 (1962), the court did not reach the merits because the counterclaim was asserted by a Cuban national, who was not entitled, as against his own government, to raise any claim based on violation of international law or of Cuban law. (See A. p 38, n. 4) Nonetheless, then Circuit Justice Burger was moved to say, in dissent, that

I do not think we should carry the act of state doctrine to the point where we permit a foreign state to come into our courts as a suitor and secure equitable relief on better or different terms than those available to an American litigant in the same courts.

tion. United States Constitution, Amendments V, XIV; Fundamental Law of Cuba, Article 24; Cuban Law No. 851; Hackworth, *Digest of International Law* Vol. III, 656, 662; Restatement (Second), *Foreign Relations Law of the United States*, §§ 185-192; Hyde, *International Law Chiefly as Interpreted and Applied by the United States*, 710-25 (2d rev. ed. 1947); see, generally, Wortley, *Expropriation in Public International Law*, 33-36 (1959).<sup>10</sup>

Cuban law follows and expresses this proposition. Article 24 of the Fundamental Law of Cuba requires that compensation be paid for property taken by the government. Cuban Law 851 itself gives explicit recognition to this principle although the specific compensation there promised is illusory and, in fact, was never paid.

The proposition is a fundamental policy of the United States. (Constitution, Amendments V, XIV.) In the view of the United States, the right to prompt, adequate and effective compensation is an essential and fundamental principle of international law, observed and recorded in specific terms by the Legislative and Executive branches. Congress has defined the obligations of an expropriating sovereign to include "speedy compensation for such property in convertible foreign exchange, equivalent to the full

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<sup>10</sup> Although respondent, in its briefs below, has denied the universality of this proposition, the great weight of authority holds that governmental seizure of property requires the payment of fair compensation. Some commentators maintain that the sovereign obligation does not extend beyond payment of some compensation or even beyond provision for deferred payment; Friedman, *Expropriation in International Law*, 206 (1953); Dawson & Weston, "Prompt, Adequate and Effective": A Universal Standard of Compensation?, 30 Ford. L. Rev. 727 (1962); compare Fachiri, *Expropriations & International Law*, [1925] Brit. Y. B. Int'l L. 15, with Williams, *International Law and the Property of Aliens* [1928] Brit. Y. B. Int'l L. 1; cf. *Sabbatino*, 376 U. S., at 428, n. 26, 429 n. 31, 430 n. 32, but see 430 n. 34. The United States has never regarded as persuasive those isolated instances in which confiscators or their apologists have declined to be bound by any requirement of compensation, or have urged, in furtherance of their immediate political purposes, that the established rule be abrogated. Hackworth, etc., *supra*.

value thereof, as required by international law". 22 U.S.C. § 2370(e)(1). The Executive has stated that

The Government of the United States merely adverts to a self-evident fact when it notes that the applicable precedents and recognized authorities on international law support its declaration that, under every rule of law and equity, no government is entitled to expropriate private property, for whatever purpose, without provision for prompt, adequate, and effective payment therefor. In addition, clauses appearing in the constitutions of almost all nations today, and in particular in the constitutions of the American republics, embody the principle of just compensation. These, in themselves, are declaratory of the like principle in the law of nations.

Note of Secretary of State Cordell Hull, August 22, 1938, to the Mexican Government, Hackworth, *supra*, Vol. III, 658-9. In an earlier letter, Secretary Hull said that

The taking of property without compensation is not expropriation. It is confiscation. It is no less confiscation because there may be an expressed intent to pay at some time in the future. (*id.*, 656)

It is this proposition, therefore, that our courts are bound to declare and support whenever it is challenged. In *The Paquete Habana*, 175 U.S. 677 (1900), this Court said:

International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination.

In this case, the question of whether the right to compensation is a principle of international law is duly pre-



sented to the Court for determination. This Court's disposition of this case, no matter whether by adjudication on the merits or by refusal to adjudicate, will resolve that question. This is true for the following reasons:

Cuba's seizure of petitioner's property is a notorious fact, conceded in the record. (A. p. 30) The institution by respondent of this action puts the legal consequences of that fact in issue; because, if petitioner has a claim for compensation, respondent by stipulation can recover nothing in this action.<sup>11</sup> If the Cuban seizure of petitioner's property gave rise to no claim or right to compensation, petitioner's counterclaim fails. Affirmance of the district court's judgment will affirm the proposition, so often enunciated by our Government, that a sovereign's right to take property of United States nationals is coupled with an obligation to make prompt, adequate and effective compensation. But reversal of the district court's judgment will legitimize Cuba's proposition: that a foreign sovereign may, for whatever reason, seize and retain the property of American nationals, free from any obligation to pay for what it has taken and from any obligation to account for its conduct, even when it voluntarily enters American courts seeking the help of American law.

The courts found in the *Sabbatino* litigation that the Cuban confiscations upon which petitioner's counterclaim is based were intended to and did discriminate against United States nationals in retaliation for United States government action displeasing to the Cuban government, and deprived those American nationals of property without compensation or indemnity whatsoever. *Banco Nacional de Cuba v. Farr*, 383 F.2d 166 (2d Cir. 1967), cert. den., 390 U.S. 956 (1968). The essence of respondent's position is that Cuba's sovereignty bars any remedy for this confiscation in the courts of the United States, even in

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<sup>11</sup> Under Rule 13 of the Federal Rules of Civil Procedure it was proper (indeed, may have been compulsory) for petitioner to plead that offsetting claim as a counterclaim.



an action instituted in those courts by Cuba itself. To hold for the respondent, therefore, means acquiescence in its declaration of sovereign irresponsibility. It means that the international law which is a part of our law, and which our courts must therefore administer, is the version of international law that Cuba finds most advantageous to it in the context of this lawsuit. It means the repudiation of the United States' view of international law as expressed by the Executive and Legislative branches; it constitutes a judicial reversal of the foreign policy of the United States as formally declared since the earliest days of the Republic.

2. *The District Court Correctly Found that the Counterclaim was Properly Pleaded.* As often as the respondent has argued that Cuba's confiscation of petitioner's properties was *damnum absque injuria*, it has argued that, in any event, Banco Nacional de Cuba is not answerable for the debts or defaults of the Cuban government. This fabrication was demolished by the district court and was not examined by the court of appeals. It deserves no consideration; but, as it has so repeatedly been urged by the respondent, we are constrained to anticipate that this argument will be made once more.

The district court found, upon the full record before it, that Banco Nacional is for purposes of this litigation indistinguishable from the government of Cuba. Banco Nacional has always been the central bank of Cuba, acting for the government, and as its fiscal agent. Whatever corporate or functional autonomy it enjoyed prior to 1959 completely disappeared since the accession of the Castro government. The facts are carefully assembled and conscientiously analyzed in Judge Bryan's opinion and amply support his conclusion. (A. p. 37, n. 3) Indeed, the respondent itself has not sought to conceal its identification with the Cuban state and has actually emphasized that fact when it deemed it advantageous to do so. *French v. Banco Nacional de Cuba*, 23 N.Y.2d 46 (1968); see *Rabinowitz v.*

*Kennedy*, 376 U.S. 605 (1964). In this very case, respondent pleaded sovereign immunity, over the signature of its present attorney, in its reply to the counterclaims (Def. Mot., Exhibit 5 (Reply), p. 5. (The form of the Reply was later amended to substitute hypothetical allegations) (A. p. 32).

The short answer to respondent's contention, however, is that, regardless of its independence of or subservience to the Cuban government and even if it were, as pretended, an autonomous corporate body, in the transaction with the bank leading to this litigation—that is, the making of the loan and the pledging of the collateral—the role of respondent has been that of agent for the Cuban government. Cuba is the real party in interest in this litigation. The loan was made to the Cuban government, and the collateral has always been Cuban government property. Common sense and simple justice make it entirely appropriate to offset the Cuban claim for proceeds of that collateral against the obligation that the Cuban government incurred when it took petitioner's property.

### Conclusion

The judgment below should be reversed and the judgments of the district court reinstated.

Respectfully submitted,

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November 24, 1971



## Statutes

*Foreign Assistance Act of 1964, 22 U.S.C. § 2370(e), as amended, 79 Stat. 659 (1965):*

(1) The President shall suspend assistance to the government of any country to which assistance is provided under this chapter or any other Act when the government of such country or any government agency or subdivision within such country on or after January 1, 1962—

(A) has nationalized or expropriated or seized ownership or control of property owned by any United States citizen or by any corporation, partnership, or association not less than 50 per centum beneficially owned by United States citizens, or

(B) \* \* \*

(C) \* \* \*

and such country, government agency, or government subdivision fails within a reasonable time (not more than six months after such action, or, in the event of a referral to the Foreign Claims Settlement Commission of the United States within such period as provided herein, not more than twenty days after the report of the Commission is received) to take appropriate steps, which may include arbitration, to discharge its obligations under international law toward such citizen or entity, including speedy compensation for such property in convertible foreign exchange, equivalent to the full value thereof, as required by international law, or fails to take steps designed to provide relief from such taxes, exactions, or conditions, as the case may be; and such suspension shall continue until the President is satisfied that appropriate steps are being taken, and no other provision of this chapter shall be construed to authorize the President to waive the provisions of this subsection.

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(2) Notwithstanding any other provision of law, no court in the United States shall decline on the ground of the federal act of state doctrine to make a determination on the merits giving effect to the principles of international law in a case in which a claim of title or other right to property is asserted by any party including a foreign state (or a party claiming through such state) based upon (or traced through) a confiscation or other taking after January 1, 1959, by an act of that state in violation of the principles of international law, including the principles of compensation and other standards set out in this subsection: *provided*, That this subparagraph shall not be applicable (1) in any case in which an act of a foreign state is not contrary to international law or with respect to a claim of title or other right to property acquired pursuant to an irrevocable letter of credit of not more than 180 days duration issued in good faith prior to the time of the confiscation or other taking, or (2) in any case with respect to which the President determines that application of the act of state doctrine is required in that particular case by the foreign policy interests of the United States and a suggestion to this effect is filed on his behalf in that case with the court.

*Cuban Law of Nationalization No. 851*

I, DR. OSVALDO DORTICOS TORRADO, President of the Republic of Cuba, do hereby make known that the Council of Ministers has enacted and I have approved the following legislation:

WHEREAS, the attitude assumed by the government and the Legislative Power of the United States of North America, which constitutes an aggression, for political purposes, against the basic interests of the Cuban economy, as recently evidenced by the Amendment to the Sugar Act just enacted by the United States Congress at the request of the Chief Executive of that country, whereby exceptional powers are conferred upon the President of the United

States to reduce the participation of Cuban sugars in the American sugar market as a threat of political action against Cuba, forces the Revolutionary Government to adopt, without hesitation, all and whatever measures it may deem appropriate or desirable for the due defense of the national sovereignty and protection of our economic development process.

WHEREAS, Article 24 of the Fundamental Law of the Republic authorizes the forced expropriation of property, leaving it to the ordinary laws to confer authority and competent jurisdiction to decree the expropriations and to regulate the procedure for the accomplishment thereof and the means and terms for the payment of the expropriated property.

WHEREAS, it is advisable, with a view to the ends referred to in the first Whereas of this Law, to confer upon the President and the Prime Minister of the Republic full authority to carry out the nationalization of the enterprises and property owned by physical and corporate persons who are nationals of the United States of North America, or of enterprises which have majority interests or participations in such enterprises, even though they be organized under the Cuban laws, so that the required measures may be adopted in future cases with a view to the ends pursued.

NOW, THEREFORE: In pursuance of the powers vested in it, the Council of Ministers has resolved to enact and promulgate the following

#### LAW No. 851

ARTICLE 1. Full authority is hereby conferred upon the President and the Prime Minister of the Republic in order that, acting jointly through appropriate resolutions whenever they shall deem it advisable or desirable for the protection of the national interests, they may proceed to nationalize, through forced expropriation, the properties or

enterprises owned by physical and corporate persons who are nationals of the United States of North America, or of the enterprises in which such physical and corporate persons have an interest, even though they be organized under the Cuban laws.

ARTICLE 2. In the resolutions providing for the expropriations the President and the Prime Minister of the Republic shall declare the necessity, public utility and national interest justifying such action.

ARTICLE 3. The President and the Prime Minister of the Republic shall also designate in the resolutions above referred to in Article 1 of this Law, the persons or agencies that shall have charge of the administration of the properties or enterprises expropriated hereunder.

ARTICLE 4. Once the expropriation of a property has been consummated and the administration thereof taken over by the person or agency designated therefor, the President and the Prime Minister of the Republic shall appoint appraisers of their election to determine the value of the expropriated property for the purposes of the payment thereof, which shall be effected as provided in the following article.

ARTICLE 5. The payment for the expropriated property shall be made, after the due appraisal thereof, in accordance with the following rules, to wit:

(a) The payment shall be made in Bonds of the Republic, which will be issued for that purpose by the Cuban State and shall be subject to the terms and conditions set forth in this Law.

(b) For the amortization of said Bonds, and by way of security therefor the Cuban State shall set up a sinking fund which shall be fed annually with twenty-five per cent (25%) of the foreign exchange corresponding to the excess



of the purchases of sugar made in each calendar year by the United States of North America over and above Three Million (3,000,000) Spanish Long Tons, for their domestic consumption, at a price of not less than 5.75 cents of a dollar per English pound (F.A.S.). To this end the National Bank of Cuba shall open a special dollar account which shall be captioned "Fund for the Payment of Expropriations of Properties and Enterprises of Nationals of the United States of North America".

(c) The Bonds shall draw at least two per cent (2%) annual interest, which shall be paid only and exclusively out of the fund to be set up and fed pursuant to Rule (b).

(d) Such annual interest as cannot be paid out of said Fund referred to above in Rule (b) shall not be cumulative, but the obligation to pay it shall be deemed extinguished.

(e) The Bonds shall be amortized in a period of not less than thirty (30) years counted from the date on which the expropriation of the property or enterprise involved is actually consummated, and the President of the National Bank of Cuba is hereby authorized to determine how and to what extent they will be amortized.

ARTICLE 6. The resolutions jointly issued by the President and the Prime Minister of the Republic in the forced expropriation proceedings instituted hereunder may not be appealed, as no remedial action shall be available there against.

ARTICLE 7. The Minister of the Treasury is hereby directed to issue, in the name and behalf of the Cuban State, the Bonds with which the property expropriated hereunder will be paid for.

ARTICLE 8. This law supersedes all and whatever legal and statutory provisions may be repugnant hereto, or may conflict with the enforcement hereof, and shall become operative from the date of its publication in the Official Gazette of the Republic.

**NOW THEREFORE:** I hereby order that this law to be fully and strictly observed and enforced.

Done at the Presidential Palace, in Havana, this 6th day of July, 1960.

OSVALDO DORTICOS TORRADO  
*President*

Fidel Castro Ruz, Prime Minister.

Rolando Díaz Aztaraín, Minister of the Treasury.

(Official Gazette No. 130, of July 7, 1960).

### *Fundamental Law of Cuba*

**ARTICLE 24.** Confiscation of property is prohibited, but it is authorized for the property of the Tyrant deposed on December 31, 1958 and of his collaborators, of natural or juridical persons responsible for crimes committed against the national economy or the public treasury, and those who are enriched or have been enriched unlawfully under the protection of the public power. No other natural or juridical person can be deprived of his property except by competent judicial authority and for a justifiable reason of public benefit or social interest and always after payments of appropriate compensation in cash, fixed by court action. Non-compliance with these requirements shall give the person whose property has been expropriated the right to protection by the courts and, if the case warrants, to restitution of his property.

The reality of the grounds for public benefit or social interest and the need for expropriation shall be decided by the courts in the event of challenge.

**ARTICLE 87.** The Cuban State recognizes the existence and legitimacy of private property in its broadest concept as a social function and without other limitations than those which, for reasons of public necessity or social interest, are imposed by law.





FILED  
DEC 31 1971

E. ROBERT SEAVIER, CLERK

IN THE  
**Supreme Court of the United States**  
October Term, 1971

**No. 70-295**

FIRST NATIONAL CITY BANK,

*Petitioner,*

*against*

BANCO NACIONAL DE CUBA,

*Respondent.*

**BRIEF FOR RESPONDENT ON WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT**

VICTOR RABINOWITZ

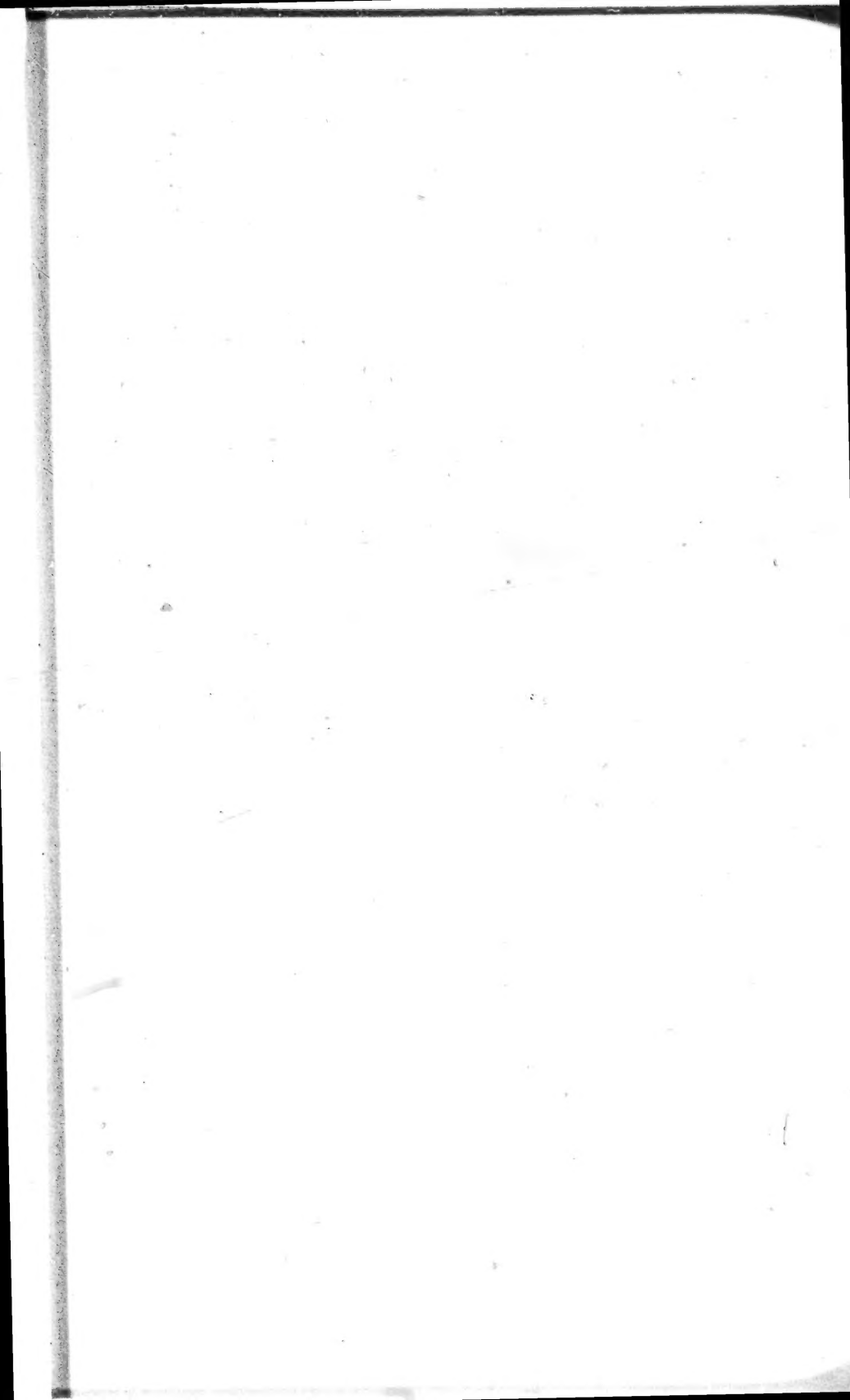
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January 3, 1972



# INDEX

	PAGE
Questions Presented for Review .....	1
Statement of the Case .....	2
Summary of Argument .....	5
ARGUMENT:	
POINT I—The decision in the <i>Sabbatino</i> case requires judgment in favor of the respondent ....	7
POINT II—There are no exceptions to the act of state doctrine applicable to this case .....	8
A. The act of state doctrine is not a rule of law to be applied or withheld at the bidding of the Executive Branch, and it should be applied in this case, notwithstanding the suggestion of the State Department to the contrary .....	8
B. The Hickenlooper Amendment is not applicable to this action .....	15
C. The act of state doctrine applies to counterclaims .....	22
POINT III—If the act of state doctrine applies, petitioner has no cause of action .....	23
POINT IV—The Hickenlooper Amendment is unconstitutional .....	26
A. The Hickenlooper Amendment is unconstitutional because it represents a legislative interference with the judicial power	26
B. The Hickenlooper Amendment, if applied to pending litigation, is unconstitutional	31



POINT V—Banco Nacional de Cuba is not liable for the obligations of the Republic of Cuba and hence the counterclaim does not state a cause of action .....	32
POINT VI—Respondent is suing in its own right and petitioner's counterclaim is against the Republic of Cuba and hence is not "a claim against an opposing party" within the meaning of Rule 13, Federal Rules of Civil Procedure ...	36
POINT VII—The nationalization of petitioner's property in Cuba did not violate international law and in any event no action would lie in a court of law to recover the value of such property .....	38
CONCLUSION .....	46
APPENDIX .....	47

### Table of Authorities

#### CASES:

American Banana Co. v. United Fruit Co., 213 U.S. 347 .....	7
Anglo-Iranian Oil Co. v. Idemitsu Kasan Kabushike Kaisha [1953] Int'l L. Rep. 305 .....	44
Anglo-Iranian Oil Co. v. Jaffrate (the Rose Mary) [1953] 1 weekly L.R. 246 .....	44
Anglo-Iranian Oil Co. Ltd. v. S.U.P.O.R. (Rome) [1955] Int'l L. Rep. 23 .....	44
The Antelope, 23 U.S. (10 Wheat.) 66 .....	39
Asselta v. 149 Madison Avenue Corporation, 79 F. Supp. 413 (S.D.N.Y. 1948) .....	32

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	PAGE
Baker v. Carr, 369 U.S. 186 .....	27, 30
Banco Nacional de Cuba v. Farr, 383 F. 2d 166 (2d Cir. 1967), <i>cert. den.</i> 390 U.S. 956 .....	35
Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 ..... 1, 4, 5, 6, 7, 9, 10, 11, 12, 13, 15, 17, 18, 22, 23 24, 27, 28, 29, 30, 34, 35, 38, 39, 43, 44, 45	
Banco Nacional de Cuba v. Sabbatino 193 F. Supp. 375 (S.D.N.Y. 1961) .....	4, 44
Banco Nacional de Cuba v. Sabbatino, 307 F. 2d 845 (2d Cir. 1962) .....	44, 45
Battaglia v. General Motors Corp., 169 F. 2d 254 (2d Cir. 1948) .....	32
Bernstein v. N.V. Nederlandsche Amerikaanische, etc., 210 F. 2d 375 (2d Cir. 1954) .....	5, 12, 13
Bernstein v. N.V. Nederlandsche Amerikaansche, etc., 173 F. 2d 71 (2d Cir. 1949) .....	12-13
Bernstein v. Van Heyghen Freres, S.A., 163 F.2d 246 (2d Cir. 1947), <i>cert. den.</i> 332 U.S. 772 .....	12
Campbell v. Holt, 115 U.S. 620 .....	32
Chambers v. Cameron, 29 F. Supp. 742 (N.D. Ill. 1939) .....	36
Chase Securities Corp. v. Donaldson, 325 U.S. 304	32
Cravatts v. Klozo Fastener Corp., 15 F.R.D. 12 (S.D.N.Y. 1953) .....	36
Den v. The Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272 .....	27
Durham v. Bunn, 95 F. Supp. 530 (E.D.Pa. 1949) ..	37
Epstein v. Shindler, 26 F.R.D. 176 (S.D.N.Y. 1960)	37

## CASES (Cont'd)

	PAGE
Erie Bank v. United States District Court, 362 F. 2d 539 (10 Cir. 1966) .....	36
Federal Radio Commission v. General Electric Co., 281 U.S. 464 .....	31
Federal Reserve Bank v. Early, 30 F. 2d 198 (4th Cir. 1929), <i>aff'd</i> 281 U.S. 84 .....	37
Federal Sugar Refining Co. v. United States Sugar Equalization Board, 268 F. 575 (S.D.N.Y. 1920) .....	34
First National Bank v. Johnson County National Bank & Trust Co., 331 F. 2d 325 (10th Cir. 1964) .....	37
Forbes Pioneer Boat Line v. Board of Commissioners 258 U.S. 338 .....	31
French v. Banco Nacional, 23 N.Y. 2d 46 (1968) 15, 16, 33	
Gordon v. United States, 69 U.S. (2 Wall.) 561 ..	31
Graham v. Goodsell, 282 U. S. 409 .....	31
Hayburn's Case, 2 U.S. (2 Dall.) 409 .....	31
In re Helbert Wagg & Co. Ltd. [1956], 1 Ch. 323 ..	44
Higgins v. Shennango Pottery Co., 99 F. Supp. 522 (W.D. Pa. 1951) .....	36
Kiefer and Kiefer v. Reconstruction Finance Corp., 306 U.S. 381 .....	35
Keller v. Potomac Electric Power Co., 261 U.S. 428 .....	31
Levy v. Wardell, 285 U.S. 542 .....	31
Libby v. Hopkins, 104 U.S. 303 .....	37
National City Bank of New York v. Republic of China, 348 U.S. 356 .....	22, 38
Noble v. Union River Logging R. Co., 147 U.S. 165	31-32
Oetjen v. Central Leather Co., 246 U.S. 297 .....	7-8, 27

## CASES (Cont'd)

	PAGE
7 The Paquette Habana, 175 U.S. 677 .....	39
Perry v. United States, 294 U.S. 330 .....	43
Pioche Mines v. Fidelity-Philadelphia Trust Co., 206 F. 2d 336 (9th Cir. 1953), <i>cert. den.</i> 346 U.S. 899 .....	36
Pons v. Republic of Cuba, 294 F. 2d 925 (D.C. Cir. 1961), <i>cert. den.</i> 368 U.S. 960 .....	9, 10, 14, 23
Postum Cereal Co. v. California Fig Nut Co., 272 U.S. 693 .....	31
Rescue Army v. Municipal Court, 331 U.S. 549 ..	31
Ricaud v. American Metal Co., 246 U.S. 304 ....	8, 11, 26
Rich v. Naviera Vacuba 197 F. Supp. 710 (E.D.Va. 1961), <i>aff'd</i> 295 F. 2d 24 (4th Cir. 1961) .....	9
Sardino v. Federal Reserve Bank, 361 F. 2d 106 (2d Cir. 1966) .....	43
Sawyer v. Hoag, 84 U.S. (17 Wall.) 610 .....	37
Shapleigh v. Mier, 299 U.S. 468 .....	26
Sloan Shipyards Corp. v. United States Shipping Board Emergency Fleet Corp., 258 U.S. 549.. ..	34
Society for the Propagation v. Wheeler, Fed. Cas. No. 13,156 .....	32
Southern Railway Co. v. Elliot, 86 F. 2d 294 (4th Cir. 1936) .....	37
Swayne & Hoyt Ltd. v. United States, 300 U.S. 297	31
Underhill v. Hernandez, 168 U.S. 250 .....	7, 11
United States v. Deutsches Kaliayndikat Gesell- schaft, 31 F. 2d 199 (S.D.N.Y. 1929) .....	34

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	PAGE
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United States v. Lynch, 292 U.S. 571 .....	31
United States v. Pink, 315 U.S. 203 .....	8, 10
United States ex rel. Rodriguez v. Weekly Publica- tions, 74 F. Supp. 763 (S.D.N.Y. 1947) .....	37
United States v. Strang, 254 U.S. 491 .....	34
William Danzer & Co. Inc. v. Gulf & S.I.R. Co., 268 U.S. 633 .....	31
Zion v. Century Safety Control Corp., 258 F. 2d 31 (3rd Cir. 1958) .....	36

## STATUTORY AND REGULATORY PROVISIONS:

## STATUTORY PROVISIONS:

## CUBA:

Agrarian Reform Act of May 17, 1959 .....	45
Article 5, Law 851 .....	24
Articles 1, 2, 6, 11, Law 930, (Feb. 23 1961) ....	31

## IRAN:

Iranian Oil Nationalization Decree of 1951 .....	44
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## FEDERAL:

Foreign Aid Act .....	11
Hickenlooper amendment, 22 U.S.C. § 2370 (e) (2) 1, 2, 4, 5, 6, 11, 14, 15, 16, 18, 20, 21, 22, 26, 29, 30	

	PAGE
International Claims Settlement Act of 1949, Subchapter V, amended Oct. 19, 1965, Pub. L. 89-262, § 1 .....	21-22
Public Law 285, 84th Cong. ....	48
Public Law 604, 85th Cong. ....	48
Sugar Act of 1948 (Public Law 86-592, 74 Stat. 331 (amending Act of August 8, 1947, 34 U.S.C. 1100-1161) .....	45
1 U.S.C. § 109 .....	32
22 U.S.C. 1643-1643k (Nov. 6, 1966), Pub. L. 89-780, § 1 .....	22
31 U.S.C. §§ 462, 463 .....	43
31 U.S.C. § 846 .....	34
 REGULATORY PROVISIONS:	
Rule 13, Fed. Rules of Civil Procedure ....	2, 7, 36, 37, 38
Cuban Assets Control Reg., 31 C.F.R. 515.101 <i>et seq.</i> .....	43
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Abdel-Wahab, <i>Economic Development Agreements and Nationalization</i> , 30 U. Cin. L. Rev. 418 (1961) .....	41
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29 Amer. J. of Int'l L. 310, 1935 .....	43
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Address by Abraham Chayes, Association of the Bar of the City of New York meeting Jan. 11, 1965 .....	29-30
<i>Chile: Documents Concerning the Nationalization of the Copper Companies</i> , 10th Int. Legal Materials (November, 1971) .....	56
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	PAGE
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5 For. Rel. U.S. 679-702 (1938) .....	40, 43
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	PAGE
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August 17, 1961, p. 8, col. 6 .....	11
Sept. 6, 1960, p. 18, col. 4 .....	45
Oct. 15, 1960, p. 1, col. 8 .....	45
October 26, 1963, p. 45, col. 4 .....	53
November 16, 1963, p. 1, col. 1 .....	53
December 16, 1971, p. 24, col. 3 .....	55
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63 Oil and Gas Journal 113 (December 27, 1965) ..	53

	PAGE
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	PAGE
Stevenson, <i>The Sabbatino Case—Three Steps Forward and Two Steps Back</i> , 57 Amer. J. of Int. Law 97 (1963) .....	13
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WALL STREET JOURNAL:	
August 11, 1965, p. 26, col. 2 .....	53
December 31, 1965, p. 26, col. 5 .....	53
February 15, 1967, p. 32, col. 1 .....	54
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February 7, 1969, p. 21, col. 3 .....	54
March 25, 1969, p. 9, col. 1 .....	54
June 26, 1970, p. 8, col. 3 .....	54
October 31, 1969, p. 5, col. 1 .....	54
September 11, 1970, p. 20, col. 3 .....	55
September 14, 1970, p. 13, col. 2 .....	55
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July 15, 1971, p. 5, col. 1 .....	56
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Wortley, <i>Protection of Property Situated Abroad</i> , 39 Tul. L. Rev. 739 (1961) .....	42
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IN THE  
**Supreme Court of the United States**  
October Term, 1971

No. 70-295

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FIRST NATIONAL CITY BANK,

*Petitioner,*

*against*

BANCO NACIONAL DE CUBA ,

*Respondent.*

---

**BRIEF FOR RESPONDENT ON WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT**

---

**Questions Presented for Review**

1. Is this Court bound by the suggestion of the State Department that henceforth there shall be an exception to the act of state doctrine, as enunciated most recently in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, to wit, that such doctrine need not be applied when it is raised to bar adjudication of a counterclaim when (a) the foreign state's claim arises from a relationship between the parties existing when the act of state occurred, (b) the amount of the relief to be granted is limited to the amount of the foreign state's claim, and (c) the foreign policy interests of the United States do not require application of the doctrine; and by the further suggestion that this is a case in which such exception should apply?

2. Does the Hickenlooper amendment, 22 U.S.C. § 2370 (e)(2), enacted to permit a court, notwithstanding the act



of state doctrine, to pass upon the validity of title to property expropriated by a foreign government when such property is marketed in the United States, likewise applicable to a counterclaim seeking compensation for the value of realty and intangible personality nationalized by the government of Cuba within its territory?

3. Is the act of state doctrine inapplicable to a counterclaim?

4. If the act of state doctrine applies, does petitioner nevertheless have a cause of action for damages against respondent arising from the nationalization of its property?

If any of the foregoing questions is answered in the affirmative, one or more of the following issues are presented, all raised in the Court of Appeals but not reached:

5. Is respondent, a wholly owned, autonomous, instrumentality of the Government of Cuba, with a capital and identity of its own, responsible for the debts of that Government?

6. In an action brought by respondent against petitioner, is the Government of Cuba an "opposing party" within Rule 13 of the Federal Rules of Civil Procedure so as to permit petitioner to interpose a counterclaim against it?

7. Is the Hickenlooper amendment unconstitutional, in that (a) it is an impermissible interference with the Judicial Branch of the government, in that it directs a court to decide a question which this Court has already found to be nonjusticiable and (b) it is here being applied retroactively to a cause of action arising out of transactions completed prior to its enactment?

8. Assuming that, for any reason, the act of state doctrine is not a defense to the petitioner's counterclaim so that the Court must pass upon this case "on the merits", did the Republic of Cuba violate international law when it nationalized the property of petitioner?

## Statement of the Case

In 1958, petitioner made a \$15,000,000 secured loan to a corporate instrumentality of the Republic of Cuba, which deposited with petitioner collateral consisting of bonds of the United States Government and obligations of the International Bank of Reconstruction and Development. The present government of Cuba came into power on January 1, 1959, and shortly thereafter respondent succeeded to all of the interests of the borrower of the funds. In July, 1960, \$5,000,000 of the loan was paid and petitioner released approximately one-third of the collateral (J.A. 11, 12).

On September 17, 1960, the Government of Cuba nationalized the branch offices of the petitioner in Cuba. Petitioner retaliated almost immediately. On September 20, 1960, it notified respondent that it had closed respondent's accounts as of September 17, 1960, and that it was claiming the amounts deposited therein as an offset against the nationalization of its properties in Cuba. Furthermore, on September 21 and 22, 1960, petitioner sold the collateral held by it as security on the \$10,000,000 loan, which was still unpaid. Petitioner received from that sale an amount—conceded to be at least \$11,892,448 and perhaps as much as \$12,412,000—which was substantially in excess of that required to discharge the \$10,000,000 principal sum and the interest thereon. It is this excess which is in dispute in this action (J.A. 12, 13, 29, 49-51).

Respondent instituted suit in November, 1960, to recover the excess (J.A. 11-13).<sup>1</sup> The petitioner's answer was long and complex (J.A. 15-28). Eliminating irrelevancies, we think it fair to state that it contains general denials as

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<sup>1</sup> The complaint alleges two causes of action, of which only the first is involved in this proceeding. The second was decided adversely to respondent by the District Court and was abandoned on appeal.

to the cause of action pleaded by the respondent and then alleges that respondent is an instrumentality of and "indistinguishable from" the Government of Cuba; that on September 16 and 17, 1960, the Republic of Cuba nationalized the property of the petitioner in the territory of Cuba and seized all of the petitioner's property and that the reasonable value of the property seized was substantially in excess of the amount claimed in the complaint. A "defense, setoff and counterclaim" is pleaded in several alternative forms: (a) that the Republic of Cuba, alleged to be the real party in interest, comes into court with unclean hands (J.A. 22, 23); (b) that petitioner has been damaged by the wrongful and tortious acts of the Republic of Cuba, for which it is entitled to recover damages (J.A. 23) and (c) that the Republic of Cuba is obligated by international law to pay prompt, adequate and effective compensation to petitioner (J.A. 23, 24).

The amended reply denies the relevant allegations of the counterclaim and alleges, as an affirmative defense, that respondent was not responsible for the obligations of the Republic of Cuba (J.A. 29-33).

In May 1961 the petitioner moved for summary judgment, relying on the District Court decision in *Banco Nacional v. Sabbatino*, 193 F. Supp. 375. No decision was made on that motion at that time and after the decision of this Court in *Sabbatino*, at 376 U.S. 398, respondent cross-moved for summary judgment. On July 21, 1967, after passage of the Hickenlooper amendment, 22 U.S.C. § 2370(e)(2), the District Court decided both motions, upholding the counterclaim for "any amounts due and owing to [petitioner] from the Cuban Government by reason of the confiscation of First National City's Cuban property". It denied petitioner's motion for summary judgment but only because there was a triable issue of fact as to the value of those properties (J.A. 34-47).

To secure a decision on the law without the necessity of a long and complicated trial on a factual issue of second-

dary importance, the parties entered into a stipulation for purposes of this case only, in which it was agreed that if petitioner is lawfully entitled to the offset claimed by it, the amount thereof is such that respondent would take nothing in this action and final judgment was entered.

Respondent appealed and the Court of Appeals unanimously reversed holding that the Hickenlooper amendment did not apply and that this Court's opinion in *Sabbatino* did (J.A. 48-70).

On petition to this Court for a writ of certiorari, the Solicitor General filed a memorandum transmitting a letter from the State Department expressing the view that the act of state doctrine should not be applied to bar consideration of counterclaims in the circumstances of this case. This Court granted the writ, vacated the judgment of the Court of Appeals and remanded the case for reconsideration "in the light of the views of the Department of State," while expressly refraining from indicating any views on the merits (J.A. 71). On remand the same panel of the Court of Appeal adhered to its original decision, this time with one judge dissenting (J.A. 72-87).

### Summary of Argument

The act of state doctrine, as formulated by this Court in *Sabbatino* and other cases, is a complete defense to the petitioner's counterclaim, and judgment should have been entered on that counterclaim in favor of respondent.

It is argued, however, that there are three applicable exceptions to the act of state doctrine. The first, urged by both the Solicitor General and the respondent, is founded on *Bernstein v. N.V. Nederlandsche Amerikaansche, etc.*, 210 F. 2d 375 (2d Cir. 1954) and is premised on the assumption that the act of state doctrine is to be applied or withheld in the discretion of the Executive Branch of the

Government. On that assumption the Solicitor General here directs the Court not to apply the act of state doctrine. Respondent believes the premise to be invalid as constituting a serious invasion of the independence of the Judiciary with the undesirable consequence that it would make this Court the instrument of the foreign policy of the Executive Branch, and subject to the inevitable and frequent changes in such policy.

The second claimed exception to the act of state doctrine, urged by petitioner, is that the Hickenlooper amendment applies. But it is clear from both its language and its legislative history, that the amendment does not apply to this kind of case. If it is applicable, by its terms it is unconstitutional, first, because it violates the separation of powers clause of the Constitution and, second, because it is here being applied retroactively.

The third claimed exception to the act of state doctrine is petitioner's contention that it does not apply to counterclaims. There is no authority for the position, and it is totally inconsistent with the reasoning of this Court in *Sabbatino*.

Petitioner further argues that even if the act of state doctrine is applicable to this case, the Cuban Government is nevertheless indebted to it for the value of the property confiscated. No authority is cited for this proposition either and respondent submits that it too, is fundamentally inconsistent with the holding of this Court in *Sabbatino*. Even if such a claim did exist, it would be governed by Cuban law, not United States law, and there is no suggestion by petitioner that under Cuban law it is entitled to the recovery it seeks.

There is furthermore a basic flaw in the petitioner's case in that on this record there is no justification for summary judgment in its favor on the counterclaim, quite regardless of any defense thereto. That counterclaim is

based on the argument that the Republic of Cuba and the respondent are the same, but that is not true either as a matter of fact or as a matter of law. Furthermore, even if Banco Nacional were to be held responsible for the debts of the Government of Cuba, the counterclaim would still be improper under Rule 13 of the Federal Rules of Civil Procedure in that the counterclaim is not a claim by "an opposing party" within that rule.

Finally, if the Court should dispose of all other issues in favor of petitioner, it would be confronted with perhaps the most difficult of all issues, namely, whether the action of the Republic of Cuba in nationalizing the property of the petitioner was in violation of international law. Respondent urges that it was not. International law cannot be anything other than the practice of nations and there is no recognizable practice which would prohibit the kind of nationalization which occurred here.

## ARGUMENT

### POINT I

**The decision in the *Sabbatino* case requires judgment in favor of the respondent.**

Judgment in favor of respondent is required by the decision of this Court in *Sabbatino*, *supra*:

"... the Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign government, extant and recognized by this country at the time of suit, in the absence of a treaty or other unambiguous agreement regarding controlling legal principles, even if the complaint alleges that the taking violates customary international law." (p. 428)

See also *Underhill v. Hernandez*, 168 U.S. 250; *American Banana Co. v. United Fruit Co.*, 213 U.S. 347; *Oetjen*

v. *Central Leather Co.*, 246 U.S. 297; *Ricaud v American Metal Co.*, 246 U.S. 304; *United States v. Belmont*, 301 U.S. 324; *United States v. Pink*, 315 U.S. 203.

The Executive Branch and the petitioner have argued that one or another alleged exceptions to the act of state doctrine applies and this brief will be in large part devoted to a discussion of those contentions.<sup>2</sup>

## POINT II

**There are no exceptions to the act of state doctrine applicable to this case.**

**A. The act of state doctrine is not a rule of law to be applied or withheld at the bidding of the Executive Branch, and it should be applied in this case, notwithstanding the suggestion of the State Department to the contrary.**

Under date of November 17, 1970, the Legal Adviser to the State Department wrote to this Court suggesting that the act of state doctrine, as expounded by this Court

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<sup>2</sup> The position of the Executive Branch and of the petitioner as well is based on the assumption that the counterclaim is a valid claim, supported by the record and that the only issue is the sufficiency of the respondent's defense thereto. But this is not so; there is no record to support a judgment on the counterclaim in any event. See Points V and VI, *infra*, pp. 32-38. Logically that should therefore be the first issue to be considered by this Court, since if respondent is right there is no occasion to consider any of the different issues arising out of the act of state doctrine and the alleged exceptions thereto. We have not been logical, however, in the writing of this brief because the Court of Appeals considered the issues in such sequence that it never reached the question of the validity of the counterclaim, although it did agree that respondent's argument as to its invalidity was made "with some justification" (J.A. 54). For that reason and because this Court remanded for further consideration of the issues arising out of the application of the act of state doctrine, we have given first attention to those issues. In fact, however, none of them need be reached.



in *Banco Nacional v. Sabbatino*, *supra* "need not be applied when it is raised to bar adjudication of a counterclaim or set-off when . . . the foreign policy interests of the United States do not require application of the doctrine". The letter goes on to say that in the instant case the foreign policy interests of the United States do not require "application of the act of state doctrine to bar adjudication of the validity" of the petitioner's counterclaim (Letter, John R. Stevenson to E. Robert Seaver, Clerk of the Court, pp. 6, 7). In a brief *amicus curiae*, subsequently filed by the Solicitor General in support of the petition for a writ of certiorari dated July, 1971, the Executive Branch goes further, alleging that in "the present class of cases" (i.e., counterclaims), the act of state doctrine "should not be applicable" (Amicus brief on petition, pp. 2 and 3). Petitioner argues that this position of the Executive Branch requires a reversal of the Court of Appeals' order.

A brief review of the various positions taken by the Executive Branch with respect to Cuban litigation may be helpful. The first relevant case was *Pons v. Republic of Cuba*, 294 F. 2d 925 (D.C. Cir. 1961), *cert. den.* 368 U.S. 960. There Cuba sued to recover money belonging to it in the possession of the defendant. The defendant counterclaimed for the value of his property which, he alleged, had been confiscated by the Cuban Government. The Court of Appeals invited the Executive Branch to file briefs, but no briefs were filed, and the court held the act of state doctrine applicable to the counterclaim, and ordered that it be dismissed. Certiorari was denied, 368 U.S. 960.

The next case was *Rich v. Naviera Vacuba*, 197 F. Supp. 710 (E.D. Va. 1961) *aff'd* 295 F.2d 24 (4th Cir. 1961). In an application for a stay pending a petition for certiorari, one of the libellants, United Fruit Company, raised issues concerning title to property nationalized by

the Cuban Government, on facts which were, in relevant respects, identical with those in *Sabbatino*. The Justice Department responded with a brief opposing the claim, saying:

"Petitioner, in effect, seeks redress in this proceeding for the expropriation of its property allegedly owned by it in Cuba. But no such redress is available here. It may be assumed that the confiscation is unlawful under international law, i.e., so far as relations between the Governments of the United States and Cuba are concerned. But that does not mean that Cuba, as between itself and petitioner, does not have valid title to the expropriated property so far as our courts are concerned."

The Solicitor General then discussed the standard act-of-state cases and went on to say:

"This act-of-state doctrine prevents any inquiry by our courts into the acts of the Cuban Government in Cuba which, in this case, may have resulted in the expropriation or confiscation of sugar or other property owned by petitioner in Cuba. And assertion that its property was seized without legal justification and without due process of law in violation of the Fifth Amendment is of no aid to petitioner. *United States v. Pink*, 315 U.S. 203, 228."

The memorandum then discussed and quoted from *Pons v. Republic of Cuba*, *supra*, and then concluded:

"This doctrine applies with full force to preclude judicial review, in domestic courts, even where the act of the foreign state is asserted, as here, to be in conflict with or in violation of international law."<sup>3</sup>

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<sup>3</sup> The original of this memorandum will be found in the files of this Court, and was reprinted in full in 1 Amer. Soc. Int'l Legal Materials, 276, 302-305 (1962).

The stay was denied on September 14, 1961, on authority of *Underhill v. Hernandez*, 168 U.S. 250 and *Ricaud v. American Metal Co.*, 246 U.S. 304.<sup>4</sup>

When the *Sabbatino* case reached this Court, the Court again invited the Executive Branch to file an amicus brief. It did so<sup>5</sup> and, in fact, argued orally in support of the act of state doctrine. After the *Sabbatino* case was decided, Senator Hickenlooper proposed an amendment to the then pending Foreign Aid Act, and in the hearings held on that Act the Executive Branch once again warmly supported the act of state doctrine and opposed the amendment.<sup>6</sup>

In the instant case, the Executive Branch has completely reversed its position. Although it purports to limit its present stand to cases involving counterclaims, the reasons urged are applicable to any kind of claim, and it is irrational to make the applicability *vel non* of the act of state doctrine depend on accidents of pleading.

The full implications of the present position of the Executive Branch are indeed grave. Although it now says that its policy with respect to foreign expropriations re-

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<sup>4</sup> One highly relevant fact does not appear in the opinions: on August 16, 1961, the day before the *Bahia di Nipe* sailed into United States waters, the Cuban Government had returned to the United States an Eastern Air Lines plane which had been hijacked three weeks prior (New York Times, August 17, 1961, p. 8, col. 6).

From the political point of view, the United States could hardly refuse to return the freighter and its cargo, in view of the fact that Cuba had just returned an airplane which had come into Cuban territory under comparable conditions. The incident affords an excellent illustration of public policy considerations which motivate governments in this area of activity and of the reasons the courts should refrain from involvement.

<sup>5</sup> That brief will be referred to hereinafter as the *Sabbatino* Amicus Brief.

<sup>6</sup> See, *infra*, footnote 8.

quires only a refusal to accept the act of state doctrine, the fact is that the purpose of the administration, namely "to protect United States investment abroad" (Amicus Brief on petition, p. 2), can be met only by an ultimate adjudication on the merits in favor of the petitioner. Thus, the Executive is now demanding not only that the Court abandon the act of state doctrine; but also, if the needs set forth in the amicus brief are to be served by the Judiciary, a ruling on the merits in favor of the petitioner for policy, not legal reasons. Abandonment of the act of state doctrine may thus place this Court in the very dilemma it sought to avoid in *Sabbatino*: it may have to choose between, on the one hand, a decision in favor of petitioner, notwithstanding the law, in order "to protect United States investments abroad" or on the other, a decision against petitioner on the law, thus defeating an important position of the Executive Branch on the subject of expropriations—a foreign policy position which extends far beyond the present controversy. This possibility is a very real one, since the question of law in this case is one that is by no means free from doubt, as this Court pointed out in *Sabbatino*, pp. 428, 429. And see Point VII, *infra*, pp. 38 *et seq.*

This is precisely what the Attorney General warned against in the *Sabbatino* Amicus Brief (p. 46) when he said that the rule now proposed by the Executive Branch "offers too much likelihood of embarrassment simply because of a miscalculation of the likely ruling of the judicial forum upon a question of international law."

Petitioner and the Executive Branch rely principally on *Bernstein v. N.V. Nederlandsche Amerikaansche, etc.*, 210 F. 2d 375 (2d Cir. 1954). We think them in error.

The *Bernstein* case arose out of an unusual set of facts. See *Bernstein v. Van Heyghen Freres S.A.*, 163 F. 2d 246 (2d Cir. 1947), *cert. den.* 332 U.S. 772; *Bernstein v. N.V. Nederlandsche Amerikaansche, etc.*, 173 F. 2d 71 (2d Cir.

1949) and *Bernstein v. N.V. Nederlandsche Amerikaansche, etc., supra*. We respectfully submit it was one of those hard cases that made doubtful law. It was characterized by the Justice Department in 1963 as "an exceedingly narrow" exception to the act of state doctrine (*Sabbatino* Amicus Brief p. 37). The "Bernstein" exception has been applied only once in the history of the United States, in the *Bernstein* case itself, and was not considered by this Court even on that single occasion. The Court of Appeals has cogently distinguished the *Bernstein* case (J.A. 79-81), as, indeed, did the Executive Branch in the *Sabbatino* Amicus brief (pp. 34-38), and we shall not repeat those distinctions here.

The proposal now made by Mr. Stevenson was first made, in slightly different form, by the Committee on International Law of the Association of the Bar of the City of New York in 1959, in a report entitled *A Reconsideration of the Act of State Doctrine in the United States Courts*.<sup>7</sup> It was there proposed that the act of state doctrine should be limited to those cases in which the Executive Branch expressly stipulates that it does not wish the court to pass upon the question of the validity of the act of a foreign sovereign. This proposal was discussed by this Court in *Sabbatino* on page 436, and was rejected for the reasons set forth in the Court's opinion. Those reasons were discussed at somewhat greater length in the *Sabbatino* Amicus Brief, at page 44:

"Such a rule would . . . put an embarrassing burden upon the Executive. In the conduct of inter-

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<sup>7</sup> The present Legal Advisor to the State Department was then Chairman of the International Law Committee of the Bar Association. The same views were expressed by him in 1963 in 57 Amer. J. of Int. Law 97, entitled *The Sabbatino Case—Three Steps Forward and Two Steps Back*, a commentary on the Court of Appeals decision in the *Sabbatino* case. Mr. Stevenson was then a member of the Board of Editors of the American Journal of International Law. The view was again put forward before this Court in the *Sabbatino* case itself.

national relations, it may be of the utmost importance to preserve silence or at least to refrain from issuing official documents upon the legal status of the act of a foreign government. The proposed rule would compel the Executive either to issue a formal statement in advance of litigation whenever a foreign government had issued a decree that someone might claim affected the title to property within its jurisdiction in violation of international law, or else to keep track of court dockets all over the country lest a case that would embarrass the conduct of foreign relations go to judgment without the Executive's raising the bar. Even if this burden were eased by requiring notice to the Executive before the presumption of executive consent would be invoked, the Executive would still face the embarrassment of taking a position when silence would be wiser, or of announcing its position at a moment highly inopportune from the diplomatic standpoint in order to suit the convenience of private litigation."<sup>8</sup>

The Executive Branch has been far from consistent in its approach to the act of state doctrine. The facts in the *Pons* case were the same as in the present case save that the party in office has changed. It is not unusual that different administrations should have different views on policy, but it is quite another thing to require the Judiciary to follow every such change in policy, especially since some of them may be quite unexpected. The result would be to turn the Court into an instrument of the foreign, or perhaps even the domestic, policies of the current Administration. This is contrary to the principle of the separation of powers and

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<sup>8</sup> The same point was also made by the Executive Branch in its testimony before Congress when it was considering the Hickenlooper Amendment. See Hearings before Committee on Foreign Relations, United States Senate, 88th Cong., 2d Sess. on S. 2659, 2660, 2662 and H.R. 11380, pp. 618, 619; Hearings Before the Committee on Foreign Affairs, House of Representatives, 89th Cong., 1st Sess., on H.R. 7750, p. 1234.



inconsistent with the integrity of the Judicial Branch, which cannot and should not be placed in a position where its decisions on important questions of international law vary from time to time as one administration succeeds another.

**B. The Hickenlooper amendment is not applicable to this action.**

As has been pointed out by others (see, e.g., *French v. Banco Nacional*, 23 N.Y. 2d 46, 80 (1968); Henkin, *Act of State Today; Recollection in Tranquility*, 6 Col. J. Transnational Law 175, 180, 1967), the Hickenlooper amendment falls far short of being a model of legislative clarity. Some aid in understanding and applying the legislation may be derived by a consideration of its legislative history.

The Hickenlooper amendment was prompted by this Court's decision in the *Sabbatino* case on March 23, 1964.

Its text appears at p. 2a of petitioner's brief. That text raises the problem of what is meant by "a case in which a claim of title or other right to property is asserted by any party . . . based upon . . . the confiscation or other taking . . .".

As we note below, Point III, until quite recently the petitioner evidently conceded that the Hickenlooper amendment did not apply to this litigation. The District Court nevertheless held that the *Sabbatino* case would have been applicable, but that it was overruled by the Hickenlooper amendment (J.A. 39-40). In its opinion it assumed, without discussion, that this was a "case" coming within the language of the amendment.

Respondent urges that the applicability of the Hickenlooper amendment is substantially limited to the factual situation presented in *Sabbatino*, i.e., to cases in which a foreign government in litigation in a United States court asserts title to marketable personal property (or the pro-



ceeds of its sale) which is sought to be disposed of in the world market. If the language is so read it does not apply at all to this situation, in which (1) the property of the petitioner which was seized in Cuba is not personal property, was not marketable and never came into the United States; and (2) the claim asserted by petitioner is not a claim "asserted by any party . . . based upon . . . a confiscation"; rather it is a claim asserted in derogation of the Cuban nationalization decree.

The language of the statute cannot reasonably be extended to cover this case. *French v. Banco Nacional*, 23 N.Y. 2d 46 (1968). This is so because Congress did not intend to legislate with respect to these facts—indeed, the legislative history specifically negatives any such intent.

The amendment<sup>9</sup> as originally proposed by Senator Hickenlooper in the Foreign Relations Committee in April, 1964 read as follows:

"No court in the United States shall decline on the ground of the federal act of state doctrine to make a determination on the merits, or to apply principles of international law including the principles of compensation and the other standards set out in this subsection, in a case in which an act of a foreign state occurring after January 1, 1959 is alleged to be contrary to international law, and effect shall not be given by the court in any such case to acts that are found to be in violation thereof." (S. Rep. No. 1188, Part I, 88th Cong., 2d Sess. [1964], p. 37; emphasis added.)

Had this language been retained, the statute would clearly cover the situation presented by this record; how-

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<sup>9</sup> Throughout the legislative history of the amendment in both 1964 and 1965 it is referred to, not as the Hickenlooper amendment, but as the Sabbatino Amendment. (Senate Hearings, *supra*; Hearings before the House Committee on Foreign Affairs on H.R. 7750, 89th Cong., 1st Sess. [1965], *passim*.)

ever, it was *not* retained and the Conference Committee, in September 1964, rewrote the language substantially, inserting, *inter alia*, the reference to a "claim of title or other right" which now appears in the statute. The words "to property" were added in 1965.

Examination of the debates in Congress and testimony before the several Congressional Committees considering the amendment in 1964, and again in 1965, demonstrates that the Congress was concerned only with the *Sabbatino* problem, namely, an attempt by an expropriating state to dispose of compensable, marketable personal property, usually industrial products, by asserting title hereto based on the expropriation.

For example, on August 14, 1964, Senator Hickenlooper, in a letter to the Washington Post, inserted in the Congressional Record, answered an editorial in opposition to his amendment, and explained that the purpose of his proposal was to require American courts to apply international law "whenever expropriated property comes within the territorial jurisdiction of the United States" (110 Cong. Rec. 19548). He expressed his concern that unless the *Sabbatino* decision was overruled "the result will be that property expropriated in violation of international law can be marketed throughout the world without hindrance by the judicial processes of national courts all over the globe. Certainly the United States should not become an international 'thieves market' ". (110 Cong. Rec. 19548.)

It would be wearisome to call attention to the scores of additional instances in the legislative history of the amendment in which this thesis was repeated by both proponents and opponents of the bill. See, for example, 110 Cong. Rec. 19548, 19555, 19557, 19559. When the Conference Committee reported to the House of Representatives on October 2,

1964, Congressman Adair, who sponsored the legislation in the lower chamber, explained the amendment by saying

“It insures that, however the case may arise or the act of state doctrine be invoked, a party who had suffered an expropriation in violation of these principles [of international law] may bring suit to assert his claim to the expropriated property if there is an attempt to market it in the United States or can resist a suit by the expropriating government to seize the property.” (110 Cong. Rec. 23680)

Senator Hickenlooper on the next day repeated virtually the same language to the Senate. (110 Cong. Rec. 24076-77.)

The Hickenlooper amendment in its original form was limited to one year and when it came up again in 1965 the tenor of the discussion was exactly the same. Extended hearings were held before the House Committee on Foreign Affairs. The first witness was Professor Cecil Olmstead representing the Rule of Law Committee, one of the original authors of the amendment. Throughout his testimony, as well as that of other interested witnesses, concern was expressed that the *Sabbatino* decision would make it impossible for United States owners of expropriated property to attach their former property if it later came within the jurisdiction of American courts, and it was predicted that courts of other countries would follow the rule of our Supreme Court with respect to property brought within their jurisdictions. (House Comm. Hearings, *supra*, pp. 579, 591, 592, 599, 601, 605, 612, 613, 614, 615.)

Professor Olmstead explained not only what the Hickenlooper amendment was intended to do but also what it was *not* intended to do. Indeed, Mr. Fraser, a member of the Foreign Affairs Committee, was much concerned over the applicability of the amendment to the very situation presented in this case. His colloquy with Professor Olmstead

is most illuminating on this issue. (House Hearings, *supra*, p. 608):

"Mr. Fraser. . . .

One of the questions that I have about this amendment is to determine how broad it is. I think particularly of the phrase here where you speak of a claim or other right asserted. For example, supposing that country X expropriates some property and doesn't compensate for it and then a property belonging to the foreign state comes into the hands of an American citizen within this country so that they bring an action, they attach the property and bring an action in the U.S. courts alleging that this government has wronged them by expropriating their property, but the property they have attached is not the property that was expropriated, nevertheless they make the claim they are entitled to compensation and the defense, I assume, by the country involved is that they had a right to expropriate.

Does that situation come within the language of your amendment?

Mr. Olmstead. No sir; that would not come within it. Our amendment has no provision in its scope to apply to property other than that actually expropriated by the foreign country itself.

Mr. Fraser. It seems to me in this kind of litigation that I am suggesting there would be at issue the question of the right of the sovereign nation to take title as against the claim by the citizen that they either had no such right or there was created a right to compensation.

Mr. Olmstead. We examined that, but it is not our intention to have it affect that kind of case and I would hope it would not.

Mr. Fraser. You are saying it would be limited solely to situations where you actually—where what at issue was the title of the property, that is the major issue?

Mr. Olmstead. Yes."<sup>10</sup>

<sup>10</sup>After his appearance before the House Committee, Professor Olmstead wrote a letter to it changing his testimony (H. Hearings, p. 1306). The letter appears to have been written with this case in mind. We do not know what prompted Professor Olmstead to change position, but his letter is almost the only support that petitioner can cite in support of its interpretation of the law.

The day after Professor Olmstead's testimony, the Attorney General of the United States appeared to testify in opposition to the amendment. In his opening remarks, he said:

"What are we talking about in this amendment? We are talking about a very isolated, infrequent occurrence which is when American property that has been nationalized in some way or another finds its way back in the United States." (House Hearings, *supra*, p. 1235)

This same thought was repeated throughout his testimony. See pp. 1236, 1237. The Attorney General engaged in extensive colloquy with members of the Committee, all of whom spoke in terms of the protection of American-owned property expropriated abroad and then imported into the United States or some other foreign country (House Hearings, *supra*, pp. 1245, 1247).

Indeed, Mr. Gross, another member of the House Committee, urged a broadening of the amendment to enable the owner of expropriated property to seize Cuban property in the United States as an offset for the value of property seized (House Hearings, p. 1249)—*precisely the position taken by the petitioner in this case*—but no such proposal was adopted by Congress. The following colloquy was had between Attorney General Katzenbach and Mr. Gallagher

"Mr. Gallagher: This amendment merely applies to property that works its way back into the United States; correct?

Attorney General Katzenbach: Yes.

Mr. Gallagher: That it has no effect whatsoever on any property that continues to rest or vest in the country that has made the seizure?

Attorney General Katzenbach: That is correct." (House Hearings, p. 1247; see also colloquy between Professor Henkin and Mr. Gallagher at p. 1072.)

Later in the hearings before the House, a number of scholars in the field of international law testified to the

same effect. See, for example, the testimony of Prof. Metzger of Georgetown University, of Prof. Myres McDougal of Yale University and of Prof. Louis Henkin of Columbia University. (House Hearings, *supra*, pp. 1025, 1028, 1030, 1031, 1043, 1045, 1059, 1072, 1076).

At the same time, the Senate Foreign Relations Committee was also holding hearings and had before it a great deal of material submitted by both proponents and opponents of the bill. A letter from the Acting Legal Officer of the Department of State, to Senator Fulbright dated April 14, 1965, also understood the Hickenlooper amendment to apply to cases of the expropriation and resale of marketable property owned by citizens of the United States (Hearings before the Sen. Comm. on Foreign Relations on the Foreign Assistance Program, 89th Cong., 1st Sess. (1965), pp. 728-29). Appendix C of the record of the hearings consists in large part of material submitted by Senator Hickenlooper and others. (Sen. Hearings, *supra*, pp. 728-759). Again the prevailing theme is the protection of American property against expropriation and resale.

Substantially every member of Congress who expressed himself on the scope of the Hickenlooper amendment and every witness who testified on the bills in 1964 and 1965 agreed on the meaning of the amendment in this respect, if not on its desirability. That meaning of the law would not sanction its application to a situation such as this where no confiscated property has found its way back into the United States, but where petitioner seeks to use the property of respondent in its possession as a set-off against a claim it asserts against Cuba—precisely the situation disavowed by the sponsors of the amendment.

Still another reason for holding the Hickenlooper amendment inapplicable was stated by the Court of Appeals, when it noted that the contrary ruling would run counter to Congressional policy as expressed in Subchapter V of the International Claims Settlement Act of 1949, amended



October 19, 1965, Pub. L. 89-262 Sec. 1; November 6, 1966, Pub. L. 89-780 Sec. 1, 22 U.S.C. 1643-1643k. As the court there notes, Cuban assets in the United States have been frozen, and the effect of a judgment in favor of petitioner would be to give it a preference over other creditors (J.A. 65-68).

If applicable, the Hickenlooper amendment is unconstitutional. See Point IV, *infra*.

**C. The act of state doctrine applies to counter-claims.**

Petitioner seems to argue that the act of state doctrine does not apply here because petitioner's claim is pleaded as a counterclaim. Reliance for this position is based solely on an erroneous construction of *National City Bank v. Republic of China*, 348 U.S. 356.

The reasons for the act of state doctrine are set forth in considerable detail in the *Sabbatino* opinion. All of those reasons apply equally to a counterclaim. Whatever may have been the reasons for the ruling in the *Republic of China* case regarding sovereign immunity, they have no relevance to the issues presented in *Sabbatino*. Those issues were not discussed by the Court in the *Republic of China* case not by the parties in the briefs they submitted to this and the lower courts. The policy upon which the act of state doctrine is based has no relationship at all to accidents of pleading.

Petitioner's argument seems to be that it is entitled "in fairness" to reduce the judgment which would otherwise be entered in favor of respondent (Br. p. 10). But such abstractly formulated ethical considerations cannot substitute for a cause of action and can hardly form the basis of a decision by a court of law. Were a discussion of "fairness" ever to become relevant, the Republic of Cuba would, no doubt, have much to say concerning its view of the many decades of the exploitation of its natural resources and of the labor power of its people for the benefit of petitioner



and other United States corporations. These considerations, however, are political and can hardly be evaluated by this Court.

Nor is the dissent in *Pons v. Republic of Cuba, supra*, at p. 926, of any help to petitioner. It was based on the fact that petitioner was there seeking equitable relief by way of an injunction and counterclaim and that "where the moving party asks the court to settle accounts between the parties, that moving party has the obligation to render an account to the other litigant according to equitable principles" (p. 927). No analogous situation is presented on this record.

### POINT III

**If the act of state doctrine applies, petitioner has no cause of action.**

Until this case reached this Court the theory on which petitioner placed principal reliance accepted the *Sabbatino* decision as applicable to its counterclaim and placed no reliance on the Hickenlooper amendment.<sup>11</sup> Recognizing

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<sup>11</sup> After the passage of the Hickenlooper amendment, the District Court offered to petitioner an opportunity to discuss the applicability of the amendment to this case, then pending before it. Counsel for petitioner submitted a memorandum to the court declining the opportunity to present its views orally, stating:

"It has been the contention of the defendant bank, from the commencement of this action, that the obligation of Cuba was due and owing and that the counterclaim expressing that obligation up to the value of the amount sought in the complaint was a complete defense to the claim of Cuba and so was pleaded to defeat that claim. The contentions made by the defendant Bank in this case long antedated the Hickenlooper Amendment. It is the belief of the defendant that the Hickenlooper Amendment did not change, purport to change, nor intend to change the obligations of Cuba to pay for American-owned property it has confiscated and it is for this reason that it is believed unnecessary to make any further statement here concerning that new U. S. enactment."

the validity of the Cuban law, it claimed that it was nevertheless entitled to compensation.<sup>12</sup>

In its present brief petitioner presents two alternative theories of recovery which it calls "independent, but consistent" (Br. p. 6). One of these theories argues that the act of state doctrine is not applicable because of the exceptions discussed in Point II above. The other argues that even if there are no exceptions to the act of state doctrine, that doctrine "does not bar consideration of the legitimacy of petitioner's claim that the Cuban government is indebted to it..." (Br. p. 7).

Petitioner provides no hint as to the basis for the right of compensation on which it relies. It does not claim to rely on Cuban law which, it has argued, provides only illusory compensation.<sup>13</sup>

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<sup>12</sup> So the petitioner, at page 19 of its first brief to the Court of Appeals, said:

"The distinctions [between the case at bar and *Sabbatino*] ... are fundamental. In *Sabbatino* the validity of Cuban Law No. 851 was challenged; in the case at bar the validity of that law is not in issue. In *Sabbatino*, the former owners of confiscated property asserted that, notwithstanding a fully executed act of state, they continued to be the owners of the property; in the case at bar Citibank does not deny that Cuba effectively took Citibank's Cuban property; Citibank merely seeks some part of the compensation due it in consequence of that taking. In *Sabbatino*, Cuba sought no affirmative recovery from C.A.V. or *Sabbatino* (its claim was to the proceeds of sugar), and neither C.A.V. nor *Sabbatino* asserted counterclaims or offsets against Cuba; in the case at bar, *Cuba* seeks a money judgment against Citibank and Citibank denies that any amount is owing because of Cuba's offsetting money obligation to Citibank."

<sup>13</sup> That law provides as follows:

"ARTICLE 5. The payment for the expropriated property shall be made, after the due appraisal thereof, in accordance with the following rules, to wit:

Petitioner seems to be alleging a right to recover from the Republic of Cuba because a tort, perhaps conversion, has been committed by it. But the conduct giving rise to these claims took place in Cuba and involved only property in Cuba. It is a most elementary rule of conflicts that such causes of action would be governed by Cuban and not by United States law. Petitioner has not argued that it is entitled to recovery under Cuban law.

Instead, petitioner seems to be arguing, first, that it is entitled to compensation, not under Cuban law and not under United States law but under something called "international law."

No authority is cited in support of the proposition that there are any provisions of international law which might give rise to such a cause of action in a court of law, independent of the law of the country in which the cause of action arose. Indeed, all of the authority is to the effect that such claims may be recovered only through diplomatic

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a) The payment shall be made in Bonds of the Republic, which will be issued for that purpose by the Cuban State and shall be subject to the terms and conditions set forth in this law.

b) For the amortization of said bonds, and by way of security therefor the Cuban State shall set up a sinking fund which shall be fed annually with twenty-five per cent (25%) of the foreign exchange corresponding to the excess of the purchases of sugar made in each calendar year by the United States of North America over and above Three Million (3,000,000) Spanish Long Tons, for their domestic consumption, at a price of not less than 5.75 cents of a dollar per English pound (F.A.S.). To this end the National Bank of Cuba shall open a special dollar account which shall be captioned 'Fund for the Payment of Expropriations of Properties and Enterprises of Nationals of the United States of North America.'

Bonds have not been issued and there are no funds out of which compensation can be made under the provisions of the law.

channels. See Point VII, *infra*. So, in *Shapleigh v. Mier*, 299 U.S. 468, this Court said at 471:

"The question is not here whether the proceeding was so conducted as to be a wrong to our nationals under the doctrines of international law, though valid under the law of the situs of the land. For wrongs of that order the remedies to be followed are along the channels of diplomacy."

And in the *Ricaud* case, *supra*, at 310, this Court said:

"Whatever rights such an American citizen may have can be asserted only through the courts of Mexico or through the political departments of our government."<sup>14</sup>

## POINT IV

**The Hickenlooper amendment is unconstitutional.**

**A. The Hickenlooper amendment is unconstitutional because it represents a legislative interference with the judicial power.**

From the earliest days of the Republic the Judiciary has jealously guarded its independence from either executive or legislative interference.

"... we think it proper to state that we do not consider Congress can either withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty; nor, on the other hand, can it bring under the judicial power, a matter which, from its nature,

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<sup>14</sup> In its first petition for certiorari, petitioner urged, as its fourth "Question Presented" the argument that an ex parte decision by Foreign Claims Settlement Commission was decisive in its favor. See Petition for Certiorari, pp. 3, 6. The point seems to have now been abandoned, though the fact of the Commission's action is recited at page 3 of petitioner's brief on the writ. In any event, respondent answered the argument in its opposition to that petition, at pp. 7 to 9 and reference is made thereto should the Court wish to consider that point.

is not a subject for judicial determination." *Den v. The Hoboken Land & Improvement Co.*, 59 U. S. (18 How.) 272, 284.

This Court has decided that the validity of a taking of property within its own territory by a foreign sovereign government is not a subject for judicial determination (376 U.S. at 428). Congress may not compel it to make such a determination, as it has here sought to do.

The Court in *Baker v. Carr*, 369 U.S. 186, had occasion to consider the circumstances under which political questions would be held to be nonjusticiable. It said on p. 217:

"It is apparent that several formulations which vary slightly according to the settings in which the questions arise may describe a political question, although each has one or more elements which identify it as essentially a function of the separation of powers. Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it, or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question."

Almost every one of these elements can be found in the instant case:

1. The issue has been constitutionally committed to coordinate political departments. The Court specifically held in *Oetjen v. Central Leather Co.*, *supra* at 302, that

"The conduct of the foreign relations of our government is committed by the Constitution to the

Executive and Legislative—"the political"—Departments of the Government and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision."

2. The Court held in its opinion in *Sabbatino* that there was a "lack of judicially discoverable and manageable standards for resolving" the issue of the validity of Cuba's nationalization decrees. The Court said, at 376 U.S. 428:

"There are few if any issues in international law today on which opinion seems to be so divided as the limitations on a state's power to expropriate the property of aliens."

The Court concluded at p. 430:

"The disagreement as to relevant international law standards reflects an even more basic divergence between the national interests of capital importing and capital exporting nations and between the social ideologies of those countries that favor state control of a considerable portion of the means of production and those that adhere to a free enterprise system. It is difficult to imagine the courts of this country embarking on adjudication in an area which touches more sensitively the practical and ideological goals of the various members of the community of nations."

We will discuss, in another connection, the lack of manageable standards in resolving issues of compensation arising in nationalization cases. See Point VII, *infra*.

3. It is clear that it would be impossible for a court to decide questions such as this without an initial policy determination of a kind which cannot be made by a court. In this very case petitioner places heavy reliance on the fact that the State Department has made protest against Cuba's seizure of property owned by United States citizens through diplomatic representation and otherwise. Pet. Brief, p. 17. Such representations were obviously a result



of a policy determination by the Executive Branch. And, of course, the State Department has made a policy determination in this very case, as set forth in Mr. Stevenson's letter.

4. A court cannot, on this sort of question, undertake independent resolution of the issue without the possibility of conflict with coordinate branches of government and particularly with the Executive, and the potentiality of embarrassment arising from differing pronouncements by separate branches of the government is very high. There is, moreover "an unusual need for unquestioning adherence to a political decision already made" if the conduct of our foreign relations is not to be severely impeded by the possibility of judicial decisions at variance with political requirements.

The petitioner may answer, as did the district court, that under the Hickenlooper amendment the possibility of embarrassment of the Executive Branch is eliminated by the opportunity given to the President to avoid the effect of the amendment through the filing of an appropriate certificate pursuant to the second proviso of the statute. It is obvious, however, that the filing of a certificate of non-embarrassment may itself be embarrassing.

Whatever the President may certify at any particular moment, the possibility of embarrassment is inherent in this situation. The danger that the court and the Executive Branch will disagree on the merits of any case cannot possibly be avoided. Indeed, the history of the Cuban litigation shows that the Executive Branch in one administration may differ with the Executive Branch in the next.

Still another element of embarrassment arising from the Hickenlooper amendment was referred to by Abraham Chayes, Legal Advisor to the State Department at the time of the *Sabbatino* case. Mr. Chayes, speaking at a meeting of the Bar Association of the City of New York on Jan. 11,



1965, referred to the elements of embarrassment mentioned above and went on to say:

“ . . . Present legislation is that it makes it awfully difficult for the Executive to carry on relations with a foreign government in the face of an effort to adjudicate . . . because the foreign government is not always going to be Cuba; it might be Chile or Brazil or a number of other countries with whom our relations have not broken down at all, and as soon as the case is filed they are going to turn around and . . . ask the State Department to prevent litigation, to ask them to get the President to say that the foreign relations of the United States, require that there should be no litigation here.”<sup>15</sup>

We discuss below, in Point VII, some of the problems which would be faced by the courts in attempting to adjudicate the host of issues left open for adjudication were the Hickenlooper amendment held to be constitutional—difficulties which arise primarily from the fact that the questions are inherently nonjusticiable.

We do not argue and this Court need not find that all “political questions” or even all “foreign relations questions” are nonjusticiable. Some kinds of political questions are justiciable (*Baker v. Carr*, 369 U.S. at 211), just as some kinds of foreign relations questions are justiciable (*Sabbatino* at 428). But on the question presented by *this* case, this Court has already made its decision. A determination of nonjusticiability, like a determination of lack of jurisdiction, is an essential part of the exercise of judicial power and Congress may no more tell a court that it must decide a question it has held to be nonjusticiable than it can direct the court to take jurisdiction of a case over which the Constitution does not give it jurisdic-

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<sup>15</sup> A transcript of the remarks by Mr. Chayes is available from the files of the Bar Association.

tion. Questions such as these involve many delicate policy considerations arising out of the court's "appropriate place" within our governmental structure, *Rescue Army v. Municipal Court*, 331 U.S. 549, 568, and are for the courts, not Congress, to decide.

On many occasions Congress has attempted to direct the courts to make judicial determination of issues which were not the subject of judicial determination. Without exception the Court has declined to do so. See *Hayburn's Case*, 2 U.S. (2 Dall.) 409; *Gordon v. United States*, 69 U.S. (2 Wall.) 561<sup>16</sup>; *Keller v. Potomac Electric Power Co.*, 261 U.S. 428; *Postum Cereal Co. v. California Fig Nut Co.*, 272 U.S. 693; *Federal Radio Comm'n v. General Electric Co.*, 281 U.S. 464.

The changes of policy between this administration and the last, on this very issue, offer warning of the difficulties which may arise in any long-lasting litigation.

**B. The Hickenlooper amendment, if applied to pending litigation, is unconstitutional.**

Retrospective legislation is unconstitutional; to the extent to which it destroys pre-existing causes of action or pre-existing defenses, or retroactively creates a cause of action or defense where none existed before, it deprives a litigant of his property without due process of law.

*Swayne & Hoyt Ltd. v. United States*, 300 U.S. 297; *United States v. Lynch*, 292 U.S. 571; *Graham v. Goodsell*, 282 U.S. 409, 426; *William Danzer & Co., Inc. v. Gulf & S.I.R. Co.*, 268 U.S. 633; *Forbes Pioneer Boat Line v. Board of Commissioners*, 258 U.S. 338; *Levy v. Wardell*, 285 U.S. 542, 544; *Noble v. Union River Log-*

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<sup>16</sup> For a detailed discussion, see the opinion prepared for the Supreme Court by Chief Justice Taney, printed at 117 U.S. 567.

*ging R. Co.*, 147 U.S. 165, 176; *Society for the Propagation v. Wheeler*, Fed Cas. No. 13,156.<sup>17</sup>

Cases which appear to be authority to the contrary for the most part involve remedial or procedural statutes not affecting substantive rights or cases involving statutory rights which were created by the Legislature and may be destroyed by the Legislature. Such, for example, are *Campbell v. Holt*, 115 U.S. 620; *Chase Securities Corp. v. Donaldson*, 325 U.S. 304; *Battaglia v. General Motors Corp.*, 169 F. 2d 254 (2d Cir. 1948) and *Asselta v. 149 Madison Avenue Corporation*, 79 F. Supp. 413 (S.D.N.Y. 1948).

## POINT V

**Banco Nacional de Cuba is not liable for the obligations of the Republic of Cuba and hence the counterclaim does not state a cause of action.**

Petitioner, in its answer alleged:

"This action is brought by and for the benefit of the Republic of Cuba, by and through its agent, a wholly owned instrumentality, the plaintiff herein, which is in fact and law and in form and function an integral part and indistinguishable from the Republic of Cuba." (J.A. 17)

There is not a scintilla of evidence in the record to justify this conclusion. To the extent to which the relationship between Banco Nacional and the Republic of Cuba was discussed at all, the record can support only a contrary conclusion, i.e., that Banco Nacional is an autonomous entity separate from the Government of Cuba with a capital and identity of its own and that it is not respon-

<sup>17</sup> A strong Congressional policy against retroactive operation of statutes extinguishing substantive rights is reflected in 1 U. S. C. § 109 and reflects Congressional sensitivity to this constitutional issue.

sible for the debts of the Government of Cuba. The most that can be said (and even this is stretching a point) is that a question of fact is raised as to the relationship of the parties under Cuban law.<sup>18</sup>

The Court of Appeals did not reach this issue, although it found "some justification" in respondent's argument (J.A. 54). There is no evidence at all to support the contrary finding of the District Court that "the Government of Cuba and Banco Nacional are one and the same for purposes of this litigation" (J.A. 37). The only argument in support of that finding appears in footnote 3 of the District Court's opinion, where the District Court suggests that plaintiff's position is "flatly inconsistent with the sovereign immunity argument".

In the first place, Banco Nacional has not in this suit pleaded sovereign immunity. In the second place, when, in other litigation, Banco Nacional has pleaded sovereign immunity the plea has been overruled. *French v. Banco Nacional, supra*. It hardly seems consistent to deny sovereign status to Banco Nacional when it seeks to assert sovereign rights, but to attribute such status to Banco Nacional when such attribution is harmful to its cause.

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<sup>18</sup> The statutes creating the bank and the unchallenged affidavit of Dr. Lopez Gonzales make it abundantly clear that Banco Nacional is an autonomous state instrumentality with an identity and capital of its own and that under Cuban law it is not responsible for the debts of the Republic of Cuba. Indeed, Art. 2 of Law 930 of February 23, 1961 (an English translation of which is annexed to the Lopez Gonzales affidavit as Ex. 2) specifically provides that the plaintiff "shall not answer for the obligations of the state or other government agencies and state enterprises, unless such obligations have been expressly assumed". The law further provided (as had the 1948 law which created the plaintiff) that the plaintiff had an independent juridical status (Art. 1 of Law 930), that it had a capital structure of its own (Art. 6) and that it had its own "functional autonomy" (Art. 11).

Nor is it of any significance that "throughout the *Sabbatino* litigation it was recognized by every court concerned that Banco Nacional de Cuba was an instrumentality of the Cuban government" (J.A. 37). Of course it is, but it does not follow that Banco Nacional is responsible for the debts of the government.

Corporations similar in their organic structure to Banco Nacional exist not only in Cuba, but in almost every country in the world. We ourselves have at least forty such corporations. See 31 U.S.C. § 846. But we have never heretofore heard it even proposed that each or any of these corporations can be held responsible for the debts of the government. It is perhaps for this reason that we can find no cases directly in point. We respectfully suggest that such a contention is preposterous on its face.

There are, however, many analogous situations in which a court has had occasion to consider the relationship between a wholly owned "instrumentality" of a government and the government itself. The courts have held, without exception so far as we know, that a corporation, even if wholly owned and controlled by a government, either our own or foreign, is still a separate entity. This conclusion has been reached even when, unlike the present situation, a foreign government has asserted the substantial identity of the government and the corporation.

"A suit against a corporation is not a suit against a government merely because it has been incorporated by direction of the government, and is used as a governmental agent, and its stock is owned solely by the government." *United States v. Deutsches Kaliayndikat Gesellschaft*, 31 F. 2d 199, 202 (S.D.N.Y. 1929).

See also *Sloan Shipyards Corp. v. United States Shipping Board Emergency Fleet Corp.*, 258 U.S. 549; *United States v. Strang*, 254 U.S. 491; *Federal Sugar Refining Co. v. United States Sugar Equalization Board*, 268 F. 575 (S.D.N.Y. 1920).

Banco Nacional is wholly owned by the Cuban Government and, of course, it is an instrumentality of the Cuban Government. So, too, the Tennessee Valley Authority and the Home Owners Loan Corporation (to pick two examples at random) are instrumentalities of the United States Government wholly owned by it. It does not follow that Banco Nacional is responsible for the obligations of the Republic of Cuba any more than that the TVA or the HOLC is responsible for the debts of the United States. Such a proposition is so unreasonable that we do not know that it has ever been seriously argued. The closest factual situations we have found are in cases like *United States ex rel. TVA v. Lacy*, 116 F. Supp. 15 (N.D. Ala. 1953); *rev. on other grounds*, 216 F. 2d 233 (5th Cir. 1954) in which the court held that in a suit by the United States, a counterclaim may not be pleaded alleging a debt of a wholly owned instrumentality of the United States. And, of course, it is well established that these wholly owned government instrumentalities are not entitled to sovereign immunity. *Keifer and Keifer v. Reconstruction Finance Corp.*, 306 U.S. 381.

It may be true that in some litigation, particularly in *Sabbatino and Banco Nacional v. Farr*, 383 F. 2d 166 (2d Cir. 1967) *cert. den.* 390 U.S. 956, no sharp effort was made to distinguish between Banco Nacional and the Cuban Government. This was so because in those cases the distinction was not relevant. In those cases no one was seeking to hold Banco Nacional liable for damages because the Republic of Cuba had confiscated the sugar involved in those cases, as the petitioner seeks to hold Banco Nacional liable in this case for damages because the Republic of Cuba has confiscated its bank.



## POINT VI

**Respondent is suing in its own right and petitioner's counterclaim is against the Republic of Cuba and hence is not "a claim against an opposing party" within the meaning of Rule 13, Federal Rules of Civil Procedure.**

Even if it be held that Banco Nacional is in some way an agent or representative of the Government of Cuba, a claim against it in that capacity may not be made the subject of a counterclaim under Rule 13. "Opposing parties" as used in Rule 13 connotes not only that, in the case of a counterclaim, the plaintiff must be the same person as the person suing the defendant, but that the capacity in which he is sued must be the same as the capacity in which he sues. It is and always has been the law that "the cause of action to be counterclaimed must be against and between the same parties, and between them in the same capacity". *Zion v. Century Safety Control Corp.*, 258 F. 2d 31 (3rd Cir. 1958); *Pioche Mines v. Fidelity-Philadelphia Trust Co.*, 206 F. 2d 336, 337 (9th Cir. 1953, *cert. den.* 346 U.S. 899); *Higgins v. Shenango Pottery Co.*, 99 F. Supp. 522 (W.D.Pa. 1951); *Chambers v. Cameron*, 29 F. Supp. 742 (N.D. Ill. 1939). Similarly, in an interpleader suit where the plaintiff asserted no claim to the interpleaded fund, a counterclaim could not be asserted by one of the claimants against the plaintiff since they were not opposing parties. *Erie Bank v. United States District Court*, 362 F. 2d 539 (10th Cir. 1966).

The general rule is that to come within the purview of Rule 13 an "opposing party" must be one who actually asserts a claim against the prospective counterclaimant and who asserts that claim in the same capacity as that in which he is counterclaimed against. *Cf. Cravatts v. Klozo Fastener Corp.*, 15 F. R. D. 12 (S.D.N.Y. 1953).



Hence, petitioner's counterclaim against the Republic of Cuba cannot be pleaded in this action. It is abundantly clear that respondent's claim against the petitioner is a claim brought by a bank in its capacity as a bank and a counterclaim cannot be brought against it as a representative of the entire Cuban nation.

Directly in point is *United States ex rel. TVA v. Lacy*, *supra*. In that case, the TVA sued as an agent of the United States. The defendants sought to interpose a counterclaim against the TVA in its individual capacity as an independent, although wholly controlled arm of the federal government. The Court dismissed the counterclaim, finding that the TVA, in its individual capacity (as opposed to its capacity as agent of the federal government) was not "an opposing party" within the meaning of Rule 13. *Id.* at p. 21.<sup>19</sup>

See also *Epstein v. Shindler*, 26 F.R.D. 176 (S.D.N.Y. 1960); *First National Bank v. Johnson County National Bank & Trust Co.*, 331 F. 2d 325 (10th Cir. 1964); *Durham v. Bunn*, 95 F. Supp. 530 (E.D. Pa. 1949).

Rule 13 did not change Equity Rule 30 in any respect relevant to this issue (see Notes of Advisory Committee on Rules at 28 U.S.C.A., Note to Rule 13). The practice prior to the adoption of the rules in 1937 was the same. *Southern Railway Co. v. Elliott*, 86 F. 2d 294 (4th Cir. 1936); *Federal Reserve Bank v. Early*, 30 F. 2d 198 (4th Cir. 1929); *aff'd* 281 U.S. 84; *Libby v. Hopkins*, 104 U.S. 303; *Sawyer v. Hoag*, 84 U.S. (17 Wall.) 610.

It was Banco Nacional and not the Republic of Cuba which instituted suit against the petitioner in the instant

<sup>19</sup> In a *qui tam* action where the government sues on behalf of an individual (i.e. non governmental) informer, the same rules apply and a counterclaim may only be interposed against the true "opposing party". See *United States ex rel. Rodriguez v. Weekly Publications*, 74 F. Supp. 763, 768-69 (S.D.N.Y. 1947) for a discussion of how this determination of the real "party" is made for Rule 13 purposes.

action.<sup>20</sup> Hence, Rule 13 would limit counterclaims to those against Banco Nacional *qua* bank; no counterclaims could lie against Banco Nacional *qua* Republic of Cuba as it was not an opposing party in the action.

## POINT VII

**The nationalization of petitioner's property in Cuba did not violate international law and in any event no action would lie in a court of law to recover the value of such property.**

If this Court should decide that the act of state doctrine does not apply and that the record supports the counterclaim against respondent, the Court will be faced with what are perhaps the most troublesome problems of all: it must ascertain what substantive standards of international law are to be applied in determining whether the Cuban expropriation decrees did violate international law and if so, what a United States municipal court can do about it. These questions were not reached by either the majority or the dissenting opinions in *Sabbatino*.

International law is generally defined as those rules of conduct which states commonly observe in their relations with each other. Thus, 1 Hyde's *International Law* (2d Rev. Ed. 1945) opens with this sentence (p. 1):

"The term international law may be fairly employed to designate the principles and rules of con-

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<sup>20</sup> This is, of course, the exact opposite situation to that in *National City Bank of New York v. Republic of China*, *supra*, where it was the Republic which sued to collect money deposited in the defendant bank by one of its governmental agencies. Since it was the named party there, a counterclaim was permitted against it as the Republic of China, although no counterclaim would presumably have lain against its agency, the Shanghai-Nanking Railway Administration.

duct declaratory thereof which States feel themselves bound to observe and, therefore, do commonly observe in their relations with each other.”

1 Oppenheim's *International Law* (Lauterpacht's 8th Ed. 1955) states:

“The sources of International Law are therefore twofold, namely (1) *express* consent, which is given when States conclude a treaty stipulating certain rules for the future international conduct of the parties; (2) *tacit* consent, that is, implied consent or consent by conduct, which is given through States having adopted the custom of submitting to certain rules of international conduct. (p. 25)

The writings of learned scholars, and practicing attorneys, *unless* they reflect actual practice, are likely to be merely theories as to what the law ought to be in an idealized international community.<sup>21</sup> Even if all of the writers were to agree on proper principles of international law (and they do not), such principles would not become international law without general concurrence of the nations of the world in actual practice. This principle has been recognized by this Court in one of the hardest cases ever to be decided by it. *The Antelope*, 23 U.S. (10 Wheat.) 66.

As this Court said in *Sabbatino*:

“There are few if any issues in international law today on which opinion seems to be so divided as the limitations on a state's power to expropriate the property of aliens. There is, of course, authority, in international judicial and arbitral decisions, in the expressions of national governments, and among commentators for the view that a taking is improper under international law if it is not for a public pur-

<sup>21</sup> This Court has said, concerning such writings: “Such works are resorted to, not for the speculations of their author concerning what the law ought to be, but for the trustworthy evidence of what the law really is.” *The Paquete Habana*, 175 U.S. 677, 700.

pose, is discriminatory, or is without provision for prompt, adequate, and effective compensation. However, Communist countries; although they have in fact provided a degree of compensation after diplomatic efforts, commonly recognize no obligation on the part of the taking country. Certain representatives of the newly independent and underdeveloped countries have questioned whether rules of state responsibility toward aliens can bind nations that have not consented to them and it is argued that the traditionally articulated standards governing expropriation of property reflect 'imperialist' interests and are inappropriate to the circumstances of emergent states.

The disagreement as to relevant international law standards reflects an even more basic divergence between the national interests of capital importing and capital exporting nations and between the social ideologies of those countries that favor state control of a considerable portion of the means of production and those that adhere to a free enterprise system. It is difficult to imagine the courts of this country embarking on adjudication in an area which touches more sensitively the practical and ideological goals of the various members of the community of nations." [Footnotes omitted; pp. 428-430.]

Perhaps the best exposition of the different opinions between "capital importing" and "capital exporting" nations can be found in the exchange of diplomatic correspondence between the United States and Mexico in which Secretary Hull expressed the traditional view of the United States—a view upon which petitioner heavily relies (Br., pp. 19, 20). But the view of the United States does not make international law and the opposing view is set forth with equal firmness by Mexico in response to Secretary Hull. The exchange is too long to set forth here, but the Court is respectfully referred to the correspondence in its entirety, which outlines the two views with admirable explicitness. ([1938] 5 For. Rel. U.S. 679-702.)

The literature on the subject is voluminous and in sharp conflict.<sup>22</sup> And the problem is far from an academic one—almost every undeveloped country is considering or has already effectuated the nationalization of private property. That there exist widespread differences in international practice is, as we shall see, an understatement.

We have prepared as an appendix to this brief a summary analysis of the principal nationalizations (excluding

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<sup>22</sup> For a sampling see: *Books*—Domke, *International Aspects of European Expropriation Measures* (1941); Foighel, *Nationalization; A Study in the Protection of Alien Property in International Law* (1957); Friedman, *Expropriation in International Law* (1953); Nishoff, *Confiscation in Private International Law* (1956); Re, *Foreign Confiscations in Anglo-American Law* (1951); U. S. Dep't of State, *Compensation for American-Owned Lands Expropriated in Mexico* (1939); G. White, *Nationalization of Foreign Property* (1961); Wortley, *Expropriation in Public International Law* (1959).

*Articles*—Abdel-Wahab, *Economic Development Agreements and Nationalization*, 30 U. Cinc. L. Rev. 418 (1961); Allison, *Cuba's Seizure of American Business*, 47 A. B. A. J. 48 (1961); Baade, *Expropriation of Foreign Private Property and The Decline of the Act of State Doctrine*, 1963 J. Bus. L. 182; Becker, *Just Compensation in Expropriation Cases: Decline and Partial Recovery*, 53 Am. Soc. Int'l Proc. 336 (1959); Dawson and Weston, "Prompt, Adequate and Effective": *A Universal Standard of Compensation?*, 30 Fordham L. Rev. 727 (1962); Domke, *Foreign Nationalizations: Some Aspects of Contemporary International Law*, 55 Am. J. Int'l L. 585 (1961); Domke and Baade, *Nationalization of Foreign-Owned Property and the Act of State Doctrine—Two Speeches*, 1963 Duke L. J. 281; Drucker, *Compensation Treaties Between Communist States: An Addendum*, 10 Int'l and Comp. L. Q. (1961); Farchiri, *Expropriations and International Law*, 1952 Brit. Int'l L. 15; Graving, *Shareholder Claims Against Cuba*, 48 A. B. A. J. 226 (1962); Katzarov, *Validity of the Act of Nationalization in International Law*, 22 Modern L. Rev. 639 (1959); Kissam and Leach, *Sovereign Expropriation of Property and Abrogation of Concession Contracts*, 28 Fordham L. Rev. 177 (1959); Kutner, *Habeas Proprietatim: An International Remedy for Wrongful Seizures of Property*, 38 U. Det. L. J. 419 (1961); Mann, *Outlines of a History of Expropriation*, 75 L. Q. Rev. 188

Cuba) which have taken place since 1917. A few observations should be made concerning this data:

1. In a large number of cases—certainly those involving the greatest dollar value of property seized—the host country denied any obligation to make any compensation at all (e.g., Soviet Union, China, Indonesia, Mexico, Eastern Europe). In some of these cases, some payment was made but it was, in the mind of the host country, *ex gratia*.

2. In many cases where the host country offered compensation because it was required to do so under its own law, the compensation was more than balanced by large assessments for damages, back taxes, excess profits, etc., so that the net compensation was zero (e.g. Peru, Chile, Algeria).

3. In a large number of cases where compensation was nominally made, its value is impossible to calculate because it was in the form of long term bonds, ultimate payment of which is uncertain, and/or it was dependent upon future market conditions and/or it was part of a package deal involving inter-governmental loans (e.g. Bolivia, Ceylon, Czechoslovakia).

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(1959); Metger, *Act of State Doctrine and Foreign Relations*, 23 U. Pitt. L. Rev. 881 (1962); Patty, *Tax Aspects of Cuban Expropriations*, 16 Tax L. Rev. 415 (1961); Re, *Foreign Claims Settlement Commission: Its Functions and Jurisdiction*, 60 Mich. L. Rev. 1079 (1962); Reeves, *Cuban Situation: The Political and Economic Relations of the U. S. and Cuba*, 17 Bus. Law 980 (1962); Rheinstein and Wortley, *Observations on Expropriation*, 7 Am. J. Comp. L. 86 (1958); Seidl-Hohenveldern, *Communist Theories on Confiscation and Expropriation: Critical Comments*, 7 Am. J. Comp. L. 541 (1958); Timberg, *Expropriation Measures and State Trading*, 55 Am. Soc. L. Proc. 113 (1961); Todd, *Winds of Change and the Law of Expropriation*, 39 Can. B. Rev. 542 (1961); Williams, *International Law and the Property of Aliens*, Brit. Yb. Int'l L. 1 (1928); Wortley, *Protection of Property Situated Abroad*, 39 Tul. L. Rev. 739 (1961); Rafat, *Compensation for Expropriated Property in Recent International Law*, 14 Villanova Law Review 199 (1969).



4. In every case in which compensation was made it was the result of inter-governmental negotiations or negotiations between the host country and the foreign investor.

5. *In no case did judicial proceedings play any role whatsoever in determining the amount of compensation.*

6. In cases in which settlements were reached as a result of inter-governmental negotiations it is clear that political as well as economic considerations were of primary importance.

Lest we become self-righteous, it should be noted that the United States itself has within recent memory confiscated the property of aliens without paying them any compensation. A current example can be found in the Cuban Assets Control Regulations, 31 C.F.R. 515.101 *et seq.* as a result of which the assets of Cubans in the United States have been seized. See *Sardino v. Federal Reserve Bank*, 361 F. 2d 106 (2d Cir. 1966), *cert. den.* 385 U.S. 898. An even more widespread example of American confiscation of foreign property was effectuated by the Gold Clause Resolution of June 5, 1933 (31 U.S.C. §§ 462, 463), which resulted in the confiscation of a substantial portion of the value of United States Government bonds. *Perry v. United States*, 294 U.S. 330. To the extent that such securities were held by non-residents of the United States, it resulted in a confiscation of the property of foreigners without compensation. See 29 Amer. J. of Int'l L. 310, 1935. It was estimated, at the time of the Resolution, that at least \$100,000,000 in United States bonds was so affected. New York Times, Feb. 19, 1935, p. 15, cols. 3 and 4.<sup>23</sup>

Prior to *Sabbatino*, no court in the United States and very few courts anywhere in the world had ever attempted

<sup>23</sup> That the Resolution was, in fact, an outright confiscation, *pro tanto*, of the property of aliens, has not escaped the attention of other countries. See the views of Mexico, in its note of Sept. 1, 1938 [1938] 5 For. Rel. U. S. 698.



to formulate standards of international law by which to determine the validity of a general nationalization of property by a socialist or nationalist regime,<sup>24</sup> and no court anywhere has ever considered the possibility that a national court could enter a judgment based on the value of property nationalized by another state. Even in *Sabbatino*, the issue was only title to a cargo of sugar, and not the value of property nationalized. The District Court in *Sabbatino* did attempt to formulate, in the most general and abstract way, a rule to determine the validity of the Cuban expropriations (193 F. Supp. 375 at 384-386); the Court of Appeals in *Sabbatino* rejected even that general rule and proposed another, equally generalized (307 F. 2d 845 at 864). This Court refused to accept either formulation, but pointed merely to the overwhelming difficulties in adjudicating the problem.

The Court of Appeals refused to find that lack of compensation alone was a violation of international law, but found instead such a violation in lack of compensation *plus* the allegedly retaliatory and discriminatory treatment of the sugar company involved in that case. But the Cuban expropriation of the property of the petitioner was neither retaliatory nor discriminatory. It was not discriminatory because it was part of a general nationalization of all bank-

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<sup>24</sup> The only two cases we have ever seen which attempted this task were *Anglo-Iranian Oil Co. v. Jaffrate* (the *Rose Mary*) [1953], 1 Weekly L. R. 246, and *Anglo-Iranian Oil Co. Ltd. v. S.U.P.O.R.* (Rome) [1955], Int'l L. Rep. 23. In the first of these cases (which was subsequently criticized by the Court of Chancery in *In re Helbert Wagg & Co. Ltd.* [1956], 1 Ch. 323), an English colonial court at Aden found that the Iranian Oil Nationalization Decree of 1951 was in violation of International law because it did not provide adequate compensation to the owners of the oil wells. In the latter case, the Rome court found the opposite, namely, that the nationalization decree *did* provide adequate compensation. To complete the picture, the Tokyo court, in *Anglo-Iranian Oil Co. v. Idemitsu Kasan Kabushike Kaisha* [1953] Int'l L. Rep. 305, in considering the same nationalization decree, could find no standards of international law to apply.

ing in Cuba, both foreign and domestic, and indeed part of the process of the nationalization of substantially all business in that country.<sup>25</sup>

Nor was the nationalization of the petitioner's bank "retaliatory". The Court of Appeals found that the Cuban nationalization was a retaliation against the congressional amendment to the Sugar Act of 1948 (Public Law 86-592, 74 Stat. 331, amending Act of August 8, 1947, 34 U.S.C. 1100-1161). But Cuba considered that Act itself retaliation against Cuba, and the Court of Appeals, in its *Sabbatino* decision (at p. 865) conceded that the purpose of the amendment to the Sugar Act "was to impose a sanction against an unfriendly nation". Cuba accordingly regarded it as a violation of the Buenos Aires Protocol of Non-Intervention of December 23, 1936 (51 Stat. 41, T.S. 923; 188 L.N.T.S. 31) and the Charter of the Organiza-

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<sup>25</sup> There is a voluminous literature on the subject of Cuban expropriations. See, for example, Huberman & Sweezy, *Anatomy of a Revolution* (1960); Williams, *The United States, Castro and Cuba* (1962); Morray, *The Second Revolution in Cuba* (1962); Phillips, *Island of Paradox* (1960); Smith, *The United States and Cuba* (1960); Zeitlin and Scheer, *Cuba: Tragedy In Our Hemisphere* (1963).

The easiest reference in English to the specific nationalization decrees can be found in the files of the New York Times which, from time to time, reported the progress of nationalization. The first important nationalizations took place with the passage of the Agrarian Reform Act of May 17, 1959. By December 8, 1960 substantially every major enterprise in Cuba, whether owned by Cubans or by aliens, was nationalized. So far as the banking industry was concerned, the first nationalization was of the Chinese (Taiwan) Bank on September 5, 1960 (New York Times, September 6, p. 18, col. 4). United States banks were nationalized on September 17, 1960 and Cuban owned banks on October 13, 1960 (New York Times, October 15, 1960, p. 1, col. 8). Canadian banks were nationalized on December 8, 1969. No compensation was paid for any of these nationalizations. It is difficult to see how any finding of discrimination can be made in these circumstances. The element of discrimination found by the Court of Appeals in *Sabbatino* (at p. 867) was not present in the case of the nationalization of the banks.

tion of American States (2 U.S.T. 2395; T.I.A.S. 2361), particularly Art. 15 thereof. Actually the whole concept of retaliation is a political one and it would require the wisdom of a Solomon to determine who was retaliating against whom, at what point in time.

The major difficulty in attempting a judicial determination of all of these problems, of course, arises from the fact that they are political and not juridical in their essence. Samy Friedman, *Expropriation in International Law* 206, 207; Baade, *Indonesian Nationalization Measures Before Foreign Courts—A Reply*, 54 *Amer. J. of Int'l L.* 801, 803 (1960), And so the Court in *Sabbatino* wisely determined that this was an area in which judicial intervention could only impede rather than strengthen the cause of international law, and that problems of this nature had best be left to the traditional method of inter-governmental negotiations. To seek to formulate out of the practice of nations in this area anything even remotely resembling a rule of law is, we submit, a fruitless task.

## CONCLUSION

The decision of the court below should be affirmed.

Respectfully submitted,

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## APPENDIX

We present below a discussion of some basic data on compensation in most of the important nationalizations taking place since 1917. It will appear that the amount of compensation paid in these nationalization cases has ranged from nothing at all to a figure which has been generally acceptable to the investor. There is great variation both in theory and in practice as to what constitutes the "real value" of expropriated property, as well as the "real value" of different forms of compensation so that no general rules governing these concepts can be attempted.

The first significant nationalizations in modern times were those resulting from the Russian revolution of 1917. The Soviet Government has consistently denied any liability in international law for compensation for such nationalization and has made only minor voluntary payments as part of political settlements made long after the nationalizations took place.<sup>1</sup>

In the 1920s and 1930s, there were extensive expropriations in Mexico involving, primarily, United States and British interests. American agrarian and non-petroleum claims were settled by the Mexican-American Agreement of 1941, although the Mexicans, like the Russians, denied any obligation to make any payment at all under international law.<sup>2</sup> The claimants valued their property at over \$350 million. They were settled for \$40 million, to be paid out

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<sup>1</sup> The Soviet view on nationalization is best expressed by Bystricky in *Notes on Certain International Problems Relating to Socialist Nationalization*, International Association of Democratic Lawyers, Proceedings of the Commission on Private International Law, 6th Congress (1956) 15. See also Doman, *Post-War Nationalization of Foreign Property in Europe*, 48 Col. L. Rev. 1125, 1143-1158.

<sup>2</sup> See *Exchange of Correspondence, United States and Mexico* [1938] 5 For. Rel. U. S. 679-702.

over a period of years.<sup>3</sup> Leaving aside the fact that money paid out over a number of years has less value than immediate cash, the settlement at best equals only 11% of the amount claimed. Similarly, the United States petroleum claims against Mexico, amounting to \$260 million, was settled in 1942 for \$24 million plus interest at 3%.<sup>4</sup>

British oil interests, on the other hand, valued their property at substantially the same amount and received \$130 million, including interest.<sup>5</sup> This wide discrepancy would seem to validate Dawson and Weston's conclusion that "despite the homage paid to those principles [of prompt, adequate and effective compensation, advanced by the United States and Great Britain], political, economic and wartime realities were apparently the decisive factors contributing to the compromise settlements."<sup>6</sup>

The next major round of nationalizations occurred in Eastern Europe in the early post-World War II period. The United States made a settlement with Yugoslavia in 1948 for \$17 million in cash to meet claims estimated at \$150 million. At the time, the United States then held \$46.8 million of Yugoslavia's gold and could have recovered at least that amount simply by vesting that sum in the United States and distributing it proportionately among claimants.<sup>7</sup> Clearly, the "generous" terms given to Yugoslavia was due to the political situation within Eastern Europe in 1948 and the desire of the United States to

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<sup>3</sup> Dawson and Weston "Prompt, Adequate and Effective": A Universal Standard of Compensation?, 30 Fordham L. Rev. 727, 740, 741 (1962).

<sup>4</sup> *Ibid.*

<sup>5</sup> *Ibid.*

<sup>6</sup> *Id.* at 742.

<sup>7</sup> *Id.* at 743, 744. This was the procedure followed in the cases of Hungary, Bulgaria and Czechoslovakia. See Public Law 285, 84th Cong. and Public Law 604, 85th Cong.

buttress the position of Yugoslavia vis-a-vis the Soviet Union.

A similar lump sum settlement made between the United States and Rumania in 1960. The United States at that time held frozen assets of \$22 million as against claims of \$85 million which had been found by the Foreign Claims Settlement Commission. By the 1960 settlement, Rumania added \$2.5 million to the frozen assets payable over 4 years.<sup>8</sup> This settlement, like that with Yugoslavia, presumably reflected some United States desire for political accommodation with Rumania.

Great Britain also had extensive claims against Eastern European nations for post-war nationalizations. The largest of these was against Czechoslovakia. Great Britain agreed to accept eight million pounds for claims totalling over one hundred million pounds. Moreover, the money was to be paid out over ten years and apparently out of Czechoslovakian profits from exports to Great Britain which were agreed upon in the settlement agreement. Furthermore, Great Britain was to provide loans to Czechoslovakia to assist it in its economic recovery.<sup>9</sup>

A similar package deal was made between Great Britain and Yugoslavia in 1949 by the terms of which Yugoslavia paid 4.5 million pounds in payment of claims totalling 25 million pounds.<sup>10</sup> Other Western European nations negotiated comparable agreements.<sup>11</sup>

In 1949, properties of very great value were nationalized by the Chinese Communist Government which came to power in that year. British claims alone are estimated at \$400 million.<sup>12</sup> No compensation at all has ever

<sup>8</sup> *Id.* at 743.

<sup>9</sup> *Id.* at 744.

<sup>10</sup> *Id.* at 744.

<sup>11</sup> *Id.* at 744.

<sup>12</sup> Clubb, *Twentieth Century China* (1964), p. 322.

been made for these expropriations, and China has steadfastly refused even to discuss a possible settlement of claims.

In the 1950s, the two most important nationalizations which were ultimately settled, were those involving the tin mines in Bolivia and the Suez Canal in Egypt.

In 1952, following a revolution, the Bolivian Government seized three tin mining companies which dominated the economy of that country. All three were largely foreign owned, and those owners placed a value of at least \$60 million for their interest in the mines. The Bolivian Government, on the other hand, claimed that the companies owed \$520 million for illegal profits, back taxes, etc.<sup>13</sup> Ultimately, an agreement was reached under which \$20.2 million was promised by the Bolivian Government.<sup>14</sup>

A serious question, however, can be raised as to how much of this compensation will come from Bolivia and how much from the American taxpayer. In the first place, the compensation was to be paid out over a number of years. More important, it was part of a package representing a political and economic accommodation between the United States and Bolivia. Bolivia agreed to allocate a percentage of its revenues as compensation for the American owned tin interest only so long as tin prices remained above a specified level. In exchange, the United States agreed to buy 15,000 tons of tin at world market price (valued at about \$30 million), to increase Point Four aid to Bolivia by \$1.5 million a year and to provide new technical assistance.<sup>15</sup>

The Suez Canal controversy is too complicated to discuss at length here. An agreement was ultimately reached

<sup>13</sup> Thomas, in 1 Proceedings of the 1959 Institute on Private Investments Abroad 437.

<sup>14</sup> Eder, *Inflation and Development in Latin America: A Case History of Inflation and Stabilization in Bolivia* (1968), p. 549.

<sup>15</sup> Thomas, *supra*, 437.



in 1958 by which Egypt agreed to pay 28.4 billion francs over five years, without interest. No agreement was ever reached on the value of the properties seized. The valuation used by the Egyptian Government was 81.8 billion (old) French francs. The company, on the other hand, contended that the property was worth well over 100 billion francs.<sup>16</sup>

There were three other important nationalizations in this period. Two of them were eventually cancelled by changed political conditions. In 1951, the Mossadegh Government in Iran nationalized the Anglo-Iranian Oil Company, whose assets were estimated to have a value of one billion dollars. That government, however, was overthrown by a coup d'etat before a settlement was reached and the nationalization decrees were significantly revised.<sup>17</sup>

In 1953, the Arbenz Government of Guatemala seized the lands of United Fruit Company; the next year the regime was overthrown and the expropriations were cancelled.<sup>18</sup>

The last major seizure of the 1950s was that of Dutch properties in Indonesia involving assets claimed to have a value of \$1 billion. The Indonesian Government denied that under international law it had any obligation to pay compensation but that it would make payments in accordance with its own law. That law provided that the amount and form of compensation were to be determined by a government appointed committee whose findings were reviewable by the Indonesian Supreme Court. Among other things, the Indonesian Government took the position that Indonesia's ability to pay would be a factor in the com-

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<sup>16</sup> Dawson and Weston, *supra*, 748, 749; Rafat, *Compensation for Expropriated Property in Recent International Law*, 14 Villanova L. Rev. 236 (1969).

<sup>17</sup> Dawson and Weston, *supra*, at 747; Wise and Ross, *The Invisible Government* (1964), pp. 110, 111.

<sup>18</sup> Horowitz, *The Free World Colossus* (1965), p. 184.

pensation. The Dutch Government refused to accept this procedure and to date the claims have apparently not been settled.<sup>19</sup>

In the early 1960s there were a series of nationalizations in Latin American of the electrical utility properties of American and Foreign Power Company, Inc. (AFP). For its properties AFP received in notes, payable in dollars, amounting \$69.6 million dollars from Mexico, \$47.8 million from Argentina, \$30.3 million from Columbia, \$152.7 million from Brazil, \$86.5 million from Chile and \$10.5 million from Costa Rica. These notes bore interest rates between 6% and 7.75% and had maturities ranging between 15 and 41 years. In the case of Mexico, Argentina and Chile, the agreement required AFP to reinvest in those countries some of the compensation thus received.<sup>20</sup>

Unfortunately, it is almost impossible to evaluate the compensation actually received, since there is no ready market for such notes and given the volatile situation in Latin America, no note payable 10, 20 or 30 years hence can be regarded as a safe investment. Thus, the Securities & Exchange Commission, in considering the value of the properties of AFP, said:

"Neither First Boston nor Lazard, despite their experience in handling and appraising the securities of Latin American governments, attempted to place a dollar value on the foreign government obligations. Both expressed the view . . . that the obligations would sell at a substantial discount if they were placed on the market." (S.E.C. Investment Co. Release No. 5215, Dec. 28, 1967)

In 1962, the American oil companies in Ceylon were nationalized. Estimates of the value of the property

<sup>19</sup> Rafat, *supra*, 239-242.

<sup>20</sup> Ebasco Industries, Inc. Annual Report 1968, p. 6; American Foreign and Power Co. Annual Report 1964, pp. 8-11; Electric Bond and Share Co. Annual Report 1967, p. 13.

ranged between \$13.6 million and \$20 million.<sup>21</sup> A settlement was ultimately reached when Ceylon agreed to pay slightly more than \$11 million. The payment, however, was not in hard currency, but in rupees. Furthermore, the payment was partly to be covered by a loan from Great Britain and partly by resumption of foreign aid from the United States.<sup>22</sup>

In 1963 the Argentine government annulled long term exploration contracts which had been made with foreign oil companies in 1956.<sup>23</sup> There was a strong protest from the United States and finally the claims were settled. Once again payments were to be spread over a number of years and there were non-cash elements in the settlement. The American companies evaluated their interests at between \$375 million and \$400 million and the face value of the compensation received was \$230 million.<sup>24</sup>

In August, 1965, Indonesia, then under the leadership of President Sukarno, announced its intention to nationalize Royal Dutch Shell and two American owned companies, Caltex and Standard Vacuum.<sup>25</sup> The Sukarno government was overthrown in December 1965, and the plans to nationalize the American oil companies were annulled. Royal Dutch Shell, however, was nationalized with compensation of \$110 million.<sup>26</sup> At the same time other properties in Indonesia belonging to American companies, like

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<sup>21</sup> New York Times, July 4, 1965, p. 4, col. 1; 63 Oil and Gas Journal 113 (December 27, 1965).

<sup>22</sup> New York Times, July 29, 1965, p. 34, col. 7; New York Times, July 4, 1965, p. 4, col. 1.

<sup>23</sup> Tanzer, *The Political Economy of International Oil and the Underdeveloped Countries* (1969), pp. 353, 354.

<sup>24</sup> 65 Oil and Gas Journal, p. 61 (January 9, 1967); New York Times, October 26, 1963, p. 45, col. 4; New York Times, November 16, 1963, p. 1, col. 1.

<sup>25</sup> Wall Street Journal, August 11, 1965, p. 26, col. 2.

<sup>26</sup> Wall Street Journal, December 31, 1965, p. 26, col. 5.

Goodyear and Uniroyal, which had been nationalized in 1965, were restored to their owners in 1967 as part of a general political realignment within the host country.<sup>27</sup>

In 1961 Iraq nationalized substantially all of the oil properties owned by foreigners. Successive governments have steadfastly refused to pay any compensation at all for the properties seized.<sup>28</sup>

There have been three more recent major nationalizations involving oil properties. In 1968 the Peruvian government nationalized the oil properties of International Petroleum Company, a subsidiary of Standard Oil of New Jersey, which the latter valued at \$120 million.<sup>29</sup> The Peruvian government counterclaimed that IPC had illegally exploited its oil fields since 1924 and actually owed \$690 million to the Peruvian government as a result thereof.<sup>30</sup> No compensation was ever paid for the properties in question and in June 1970 Charles Myers, Assistant Secretary of State for Latin American Affairs, advised the government of Peru that the controversy over the IPC nationalizations was no longer a major issue between the countries.<sup>31</sup> At about the same time Peru also nationalized the sugar plantations of W. R. Grace, paying for them in either stocks or bonds. Grace has written off the investment at a loss of 18 million dollars.<sup>32</sup>

In 1969 Bolivia nationalized the property of Gulf Oil, in which the latter had invested 150 million dollars over the previous 13 years.<sup>33</sup> A settlement was reached in September 1970, by which Bolivia agreed to pay 78.6

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<sup>27</sup> Wall Street Journal, February 15, 1967, p. 32, col. 1; Wall Street Journal, November 8, 1967, p. 2, col. 3.

<sup>28</sup> Tanzer, *supra*, pp. 75, 76.

<sup>29</sup> Wall Street Journal, February 7, 1969, p. 21, col. 3.

<sup>30</sup> Wall Street Journal, March 25, 1969, p. 9, col. 1.

<sup>31</sup> Wall Street Journal, June 26, 1970, p. 8, col. 3.

<sup>32</sup> W. R. Grace Annual Report 1970, p. 56.

<sup>33</sup> Wall Street Journal, October 31, 1969, p. 5, col. 1.

million dollars. That payment, however, was to be made without interest over a period of 20 years and contingent upon Bolivia's ability to market the oil from the seized property at a profit.<sup>34</sup> Whether in fact Gulf Oil will ever receive anything from these properties remains to be seen, but it is worth noting that Gulf Oil called the settlement "fair and equitable under the circumstances".<sup>35</sup>

In 1969 and 1970, the Algerian government nationalized the Algerian properties of a group of non-French oil companies: Standard Oil of New Jersey, Mobil, Phillips, Sinclair and Royal Dutch Shell. No data is available to us as to the compensation paid for this property, if any. In 1971 Algeria nationalized most of the French oil companies. On December 15, 1971, an agreement was signed, by the terms of which compensation of \$37 million was cancelled out by back taxes owed by the French oil company to Algeria. Algeria still claims \$80 million for other debts due to it, to be settled in the future. The result is that the owners of the property received nothing for the oil wells nationalized.<sup>36</sup>

In Zambia the government entered into an agreement with foreign copper mining companies for the purchase by the government of 51% of the shares of the foreign companies. There was a sharp dispute of the actual value of the properties in question: the book value was \$170 million but the owner estimated the value of the properties at over \$750 million. In any event, Zambia agreed to pay \$90.2 million for the stock it purchased, again to be paid over a period of time.<sup>37</sup>

In 1971 the Guyana government nationalized the bauxite properties of Alcan Ltd. Again there was a sharp dispute

<sup>34</sup> Wall Street Journal, September 11, 1970, p. 20, col. 3.

<sup>35</sup> Wall Street Journal, September 14, 1970, p. 13, col. 2.

<sup>36</sup> New York Times, December 16, 1971, p. 24, col. 3.

<sup>37</sup> Wall Street Journal, October 20, 1969, p. 15, col. 1; Fortune, Vol. 82, No. 2, August 1970, p. 190.

as to the value of the properties, various estimates ranged between \$130 million and \$85 million. The government agreed to pay \$53.5 million over a period of 20 years at 6% interest.<sup>38</sup>

Finally, in July 1971, the Chilean government nationalized the copper mining properties of Anaconda and Kennecott. Anaconda has claimed that its property is worth at least \$1.2 billion. The Chilean government, on the other hand, estimates the book value of the property at \$415 million but it has imposed a retroactive excess profits tax which exceeds that book value by a substantial amount. It therefore has offered to pay nothing for the properties in question. The situation with respect to Kennecott is similar.<sup>39</sup>

The preceding analysis has covered only major nationalizations for which data could be obtained relatively easily. Actually nationalization without "fair" compensation is an even more widespread phenomenon than the foregoing would indicate. A recent survey of 187 United States corporations which have experienced expropriations since the end of World War I (excluding Cuba) disclosed that the companies were involved in 103 separate acts of expropriation, of which 34 were in Communist countries and 69 in non-Communist countries. Most of the companies reported that they had received no compensation at all; of those who had received compensation, only about half felt that the compensation was adequate. In most cases the host government did not offer compensation at the

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<sup>38</sup> 13 Executive (Canada), Vol. 13, No. 6 (June, 1971), pp. 34, 35; Wall Street Journal, July 15, 1971, p. 5. col. 1; New York Times, June 28, 1971, p. 47, col. 3.

<sup>39</sup> *Chile: Documents Concerning the Nationalization of the Copper Companies*, 10 Int. Legal Materials (November 1971), pp. 1235 through 1253; Wall Street Journal, December , 1971, p. , col. .

time of the expropriation and even when such compensation was offered promptly it was totally inadequate.<sup>40</sup>

Finally, we may note that the U.S. State Department itself has proclaimed the virtual impossibility of determining fair compensation. In a letter to Senator J. W. Fulbright (May 7, 1962) the Assistant Secretary, Frederick G. Dutton wrote as follows:

In response to your request of May 1, 1962 for information concerning expropriation of foreign investments owned by U.S. nationals, enclosed is a list of major instances of such expropriation since World War II.

\* \* \*

In most cases, the problem of evaluation of property taken is so complex that it is impossible to arrive at a definite figure which represents the inherent value of the property for purposes of comparison with the amount of compensation offered by the taking country.

\* \* \*

The enclosed list indicates only whether settlements were made, but the Department of State considers that a settlement is concluded acceptable to both sides is more significant than the initial terms offered by the taking government.<sup>41</sup>

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<sup>40</sup> Root: *The Expropriation Experience of American Companies: What Happened to Thirty-Eight Companies*, 11 Business Horizons, p. 69 (April 1968).

<sup>41</sup> [1962] 1 U. S. Code, Congressional & Administrative News, p. 2078, 87 Cong., 2d Session.



FILE

FEB 9

E. ROBERT SEAVE

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1971

No. 70-295

FIRST NATIONAL CITY BANK,

*Petitioner,*

*against*

BANCO NACIONAL DE CUBA,

*Respondent.*

**REPLY BRIEF FOR PETITIONER ON WRIT OF CER-  
TIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE SECOND CIRCUIT**

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# TABLE OF AUTHORITIES

## Cases:

## PAGE

<i>Anglo-Iranian Oil Co. Ltd. v. S.U.P.O.R. (The Miriella)</i> , Italy, Court of Venice (1955) Int'l L. Rep. 19 .....	6, 7
<i>Banco Nacional de Cuba v. Farr</i> , 383 F.2d 166 (2d Cir. 1967), cert. den. 390 U.S. 956 (1968) ..	4, 10
<i>Banco Nacional de Cuba v. Sabbatino</i> , 376 U.S. 398 (1963) .....	7, 8, 12
<i>Banco Nacional de Cuba v. Sabbatino</i> , 307 F.2d 845 (2d Cir. 1962) .....	4
<i>Banco Nacional de Cuba v. Sabbatino</i> , 27 F.R.D. 255 (S.D.N.Y. 1961) .....	15
<i>National City Bank v. Republic of China</i> , 348 U.S. 356 (1955) .....	8, 9, 13
<i>Pons v. Republic of Cuba</i> , 294 F.2d 925 (D.C. Cir. 1961), cert. den. 368 U.S. 960 (1962) ...	13
<i>Royal Holland Lloyd v. United States</i> , 73 C. Cl. 722 (1932) .....	5
<i>S.S. Lotus</i> , P.C.I.J. ser. A, No. 10 (1927), 22 Am. J. Int'l L. 8 (1928) .....	3
<i>Schoenbaum v. Firstbrook</i> , 405 F.2d 200 (2d Cir. 1968), reh. en banc 405 F.2d 215, cert. den. sub nom. <i>Manley v. Schoenbaum</i> , 395 U.S. 906 (1969) .....	3
<i>State of Russia v. Bankers Trust Co.</i> , 4 F. Supp. 417 (S.D.N.Y. 1933), aff'd sub. nom. <i>United States v. National City Bank</i> , 83 F.2d 236 (2d Cir. 1936), cert. den. 299 U.S. 563 .....	9
<i>United Kingdom v. Iran</i> , I.C.J. Rep. (1952) 92 ..	6
<i>United States v. Aluminum Company of America</i> , 148 F.2d 416 (2d Cir. 1945) .....	3
<i>United States v. Belmont</i> , 301 U.S. 324 (1937) ..	13

*Statutes:*

	PAGE
Bankruptcy Act, § 68, 11 U.S.C. § 108 .....	11
Cuban Law of Nationalization No. 851 .....	4, 7
Cuban Law No. 891 .....	15
Foreign Assistance Act of 1961, as amended,	
22 U.S.C. § 2370(e)(1) .....	3, 7
22 U.S.C. § 2370(e)(2) .....	3, 7, 10, 11
Fundamental Law of Cuba, Article 24 .....	4, 7
International Claims Settlement Act of 1949, as amended,	
22 U.S.C. § 1643 .....	10, 11
22 U.S.C. § 1643b .....	11
22 U.S.C. § 1643e .....	11
22 U.S.C. § 1643j .....	11

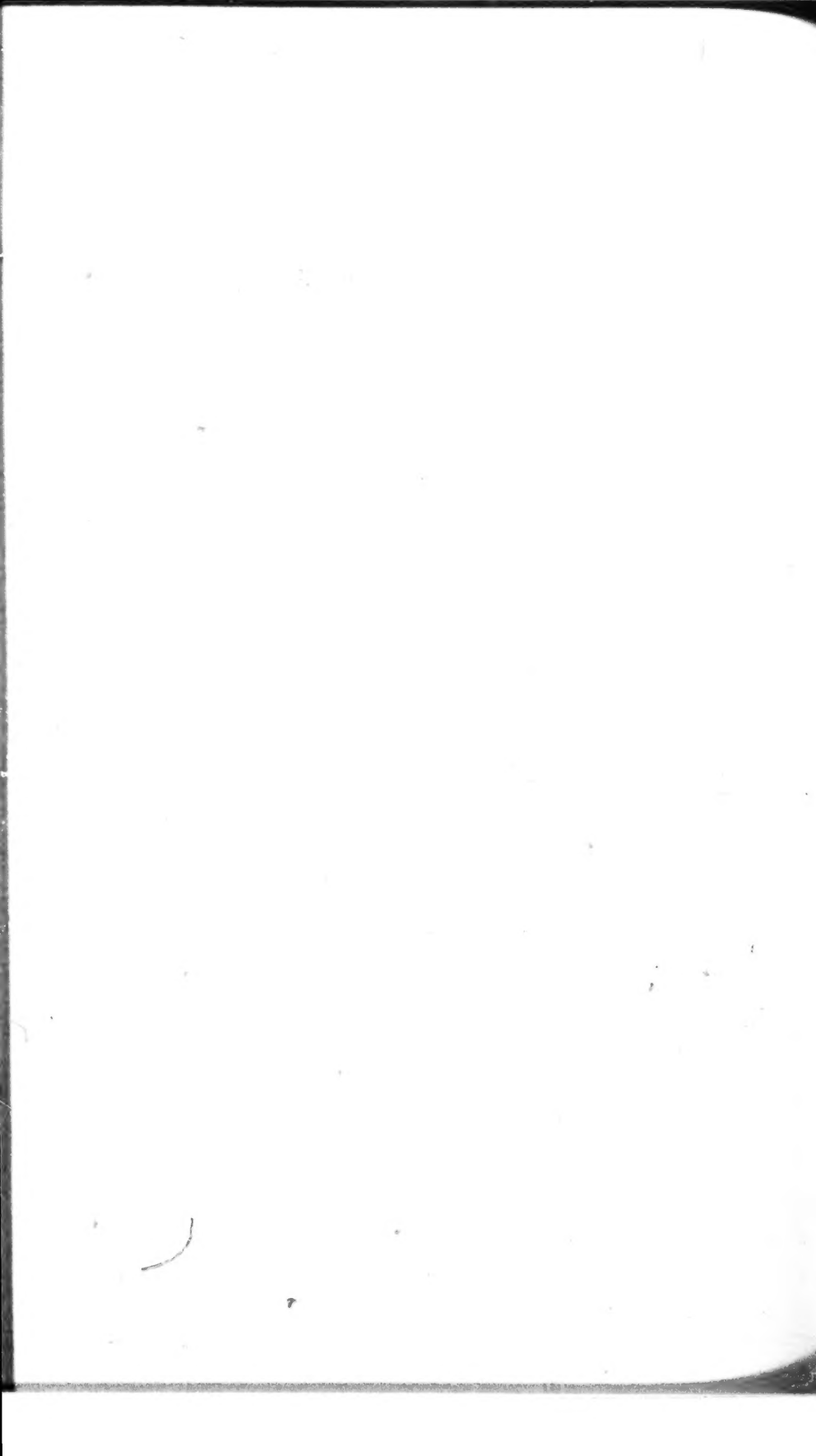
*United States Constitution:*

Article 1, § 8, cl. 3 .....	3
§ 8, cl. 10 .....	3
§ 8, cl. 18 .....	3
Amendment V .....	7
Amendment XIV .....	7

*Miscellaneous:*

Baade, <i>Indonesian Nationalization Measures Before Foreign Courts—A Reply</i> , 54 Am. J. Int'l 801, 808 (1960) .....	5
1940 For. Rel., Vol. V, pp. 1020-21 .....	6
Hackworth, <i>Digest of International Law</i> , Vol. III, pp. 652, 656 .....	4
Hazard, <i>Renewed Emphasis on a Socialist International Law</i> , 65 Am. J. Int'l L. 142 (1971) ...	6

	PAGE
New York Times, January 20, 1972, p. 1, col. 1 . .	2
Note, 42 N.Y.U. J. Int'l L. & Pol. 260, 273 (Summer, 1971) .....	11
Restatement, 2nd, <i>Foreign Relations Law of the United States</i> , § 18 (1965) .....	3
Restatement, 2nd, <i>Conflict of Laws</i> , § 6(2)(b) ...	8
Sen. Rep. No. 701, 89th Cong. 1st Sess. pp. 3, 5 ...	11
White House Press Release, January 19, 1972, "Policy Statement: Economic Assistance and Investment Security in Developing Nations"	2
Whiteman, <i>Digest of International Law</i> (1968),	
Volume 6, pages 1-54 .....	7
Volume 8, pages 1053-1057 .....	7
Volume 8, pages 1085-1136 .....	6
Volume 8, pages 1095-1096 .....	7
Volume 8, pages 1101-1105 .....	6
Volume 8, pages 1170-1178 .....	7
Wortley, <i>Expropriation in Public International Law</i> , 33-36, 152-153 (1959) .....	5



IN THE

**Supreme Court of the United States**  
**OCTOBER TERM, 1971**

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**No. 70-295**

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FIRST NATIONAL CITY BANK,

*Petitioner,*

*against*

BANCO NACIONAL DE CUBA,

*Respondent.*

---

**REPLY BRIEF FOR PETITIONER ON WRIT OF CER-  
TIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE SECOND CIRCUIT**

The ultimate issue presented by this case is whether a foreign state should be permitted to come into our courts as a suitor and secure relief on better or different terms than those available to an American litigant in the same court. The Cuban Government<sup>1</sup> has come into our courts demanding a money judgment against petitioner. That relief would not be available to an American litigant because petitioner's claim would offset, and thus extinguish, respondent's claim. Respondent does not deny that it took and holds petitioner's property; it asks "what a

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<sup>1</sup>"[T]he Government of Cuba and Banco Nacional are one and the same for purposes of this litigation" (A.37). Respondent's persistent assertions that Banco Nacional is not responsible for the debts of Cuba and that it is "suing in its own right" are not relevant nor consistent with the record facts. Cf. *infra* pp. 14-17.

United States municipal court can do about it." (Brief for Respondent herein, "Resp. Br" p. 38).

Two questions are presented to this Court: (1) is a United States national, whose property has been confiscated by a foreign government, lawfully entitled to compensation for that property; and (2) in the circumstances of this case, does the act of state doctrine preclude the court from recognizing the validity of petitioner's claim?

1. *Petitioner is lawfully entitled to the offset claimed by it.* Petitioner's position is that its right to compensation flows from United States law, Cuban law, and international law (Brief for Petitioner herein, "Pet. Br." pp. 16-22). The President has recently stated the applicable United States policy in unmistakable terms.<sup>2</sup> What the New York Times called the "key passage"<sup>3</sup> declared:

Under international law, the United States has a right to expect:

—That any taking of American private property will be non-discriminatory;

—That it will be for a public purpose; and

—That its citizens will receive prompt, adequate, and effective compensation from the expropriating country.

That statement is a reaffirmation of the long-standing policy of the United States and is fully in accord with the authorities cited in our main brief.<sup>4</sup> It is declarative of the law of the United States, as expressed by Congress in

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<sup>2</sup> White House Press Release, January 19, 1972, entitled "Policy Statement: Economic Assistance and Investment Security in Developing Nations."

<sup>3</sup> The New York Times, January 20, 1972, p. 1, col. 1.

<sup>4</sup> Pet. Br. pp. 18-21.



the Foreign Assistance Act of 1961, as amended,<sup>5</sup> which defines an expropriating country's obligations under international law, specifying that these obligations include speedy compensation for such property in convertible foreign exchange, equivalent to the full value thereof. The statute, as amplified by the Hickenlooper Amendment<sup>6</sup> is a "rule of compensation legislatively announced by Congress . . ." (A. 41). Judge Bryan aptly said, "This Court would accordingly be bound to apply the provisions of the Hickenlooper Amendment even if they were found to be inconsistent with the views of other nations on international law, though that is not so here."

The United States rule of law is "fully consistent with generally accepted principles of international law" (A. 41). Respondent, however, asks this Court to hold that there is no principle of international law that imposes any restrictions or consequences on a sovereign state which chooses to confiscate the property of aliens. To that end, respondent introduces an unsupported and insupportable premise, namely, that no rule can be treated as a principle of international law unless it is unanimously accepted by

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<sup>5</sup> 22 U.S.C. § 2370(e)(1). The Constitution gives Congress the power to "define . . . Offences against the Law of Nations", Art. 1, § 8, cl. 10, and to "regulate Commerce with foreign Nations", § 8, cl. 3; cf. § 8, cl. 18. Congress clearly has power to attach legal consequences to acts occurring abroad which affect United States interests. *United States v. Aluminum Company of America*, 148 F.2d 416 (2d Cir. 1945); *Schoenbaum v. Firstbrook*, 405 F.2d 200 (2d Cir. 1968), *reh. en banc* 405 F.2d 215, *cert. den. sub nom. Manley v. Schoenbaum*, 395 U.S. 906 (1969). This power is in accord with international law. *S.S. Lotus*, P.C.I.J. ser. A, No. 10 (1927), 22 Am. J. Int'l L. 8 (1928); Restatement, 2nd, *Foreign Relations Law of the United States*, § 18 (1965).

<sup>6</sup> 22 U.S.C. § 2370(e)(2).

<sup>7</sup> (A. 41). The court of appeals believed that the Hickenlooper Amendment, 22 U.S.C. § 2370(e)(2), did not lift the procedural bar of the act of state doctrine in this case, but it did not disturb or question Judge Bryan's finding that the first part of that statute, 22 U.S.C. § 2370(e)(1), is a substantive rule of general application.

all nations each time it is asserted, and that when any nation elects to change its own practice, it is no longer bound by the practice of nations (Resp. Br. Pt. VII, Appendix). This contention, of course, is the antithesis of the United States view: "nor can we admit that any government, unilaterally and through its municipal legislation can, as in this instant case, nullify this universally accepted principle of international law. . . ." Hackworth, *Digest of International Law*, Vol. III, p. 652, at 656.<sup>8</sup>

There can be no doubt that "international law, at least from the parochial point of view of the United States, requires full compensation for seizures of American-owned property." (A.40) The United States' point of view is considerably more than "parochial". The Second Circuit has stated that "it appears that most of the writers on the subject have asserted that just compensation for government taking is a requirement of international law." *Banco Nacional de Cuba v. Sabbatino*, 307 F.2d 845, 863 (2d Cir. 1962), *r.o.g.* 376 U.S. 398 (1963); *accord*, *Banco Nacional de Cuba v. Farr*, 383 F.2d 166, 183 (2d Cir. 1967), *cert. den.*, 390 U.S. 956 (1968).<sup>9</sup>

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<sup>8</sup> Respondent's contention that the Cuban view of international law is that no compensation need be paid for nationalized property is flatly contradicted by Article 24 of the Fundamental Law of Cuba (Pet. Br., p. 6a) and the lip-service given to the principle of compensation in the nationalization statute itself (*id.*, p. 2a). In the light of these Cuban statutes, respondent is less than candid in its assertions that "Petitioner provides no hint as to the basis for the right of compensation on which it relies" (Resp. Br., p. 24) and that "Petitioner has not argued that it is entitled to recovery under Cuban law" (Resp. Br., p. 25, but see Pet. Br., p. 19 and Petition for Writ of Certiorari, pp. 14-15). Respondent's argument really comes down to this: that by failing to meet the dictates of its own law and by violating the principles it has professed and solemnly proclaimed, Cuba has made those principles disappear.

<sup>9</sup> See 307 F.2d, 863, n. 12 for a listing of other authorities on the subject, considered by the Second Circuit but not included in respondent's list at Resp. Br. p. 41, n. 22, and 307 F.2d, 863, n. 11 for a listing of ten cases predicated upon the proposition that compensation is due for government taking. Our own courts have

(footnote continued on following page)

Authorities on international law have examined self-serving nationalistic views on non-responsibility to compensate foreigners, and found such views neither in accord with the obligations imposed by international law on national conduct nor in accord with general national practice, even after 1917 (the date selected by respondent):

Neither municipal legislation as such nor any absence of uniformity in it provides a necessary basis for a rule of public international law. When a writer says that 'States when engaged in reforms of their social and economic structure deny the existence of a duty to compensate' [S. Friedman, *Expropriation in International Law*, London, 1953, pp. 207, 221], he is merely referring to the statements made by the French, Mexican and Russian Revolutionary Governments to justify revolutionary seizures, whereas, in fact, at different times, as the same writer himself shows, France, Russia and Mexico have found it expedient to make some measure of compensation for property so seized, even though it may have been expressed to be *ex gratia*. . . . The varying practice of States is not a conclusive argument as to legal rights in international law. (Wortley, *Expropriation in Public International Law* (1959), 152-153.)

Thus, while the Mexican view regarding the 1938 expropriations is described by respondent as the opposite of that of the United States (Resp. Br. p. 40) (although Mexico took the position that it *did* respect

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held the United States itself responsible for damage claims under international law even where United States local law provided no remedy. *Royal Holland Lloyd v. United States*, 73 C. Cl. 722 (1932). See also Wortley, *Expropriation in Public International Law*, 33-36 (1959) for a list (which Professor Wortley characterizes as "not exhaustive") of some thirty authorities in various countries, holding the view that compensation is required. That this is the "prevailing view", is indicated in Baade, *Indonesian Nationalization Measures Before Foreign Courts—A Reply*, 54 Am. J. Int'l. 801, 808 (1960). It can hardly be said that the authorities are in "sharp conflict" (Resp. Br. p. 41).

"the principle of compensation" although not "immediate compensation", 1940 For. Rel., vol. V, pp. 1020, 21, 26), Mexico did in fact pay Sinclair Oil Company alone \$13,500,000 for its property in 1940, and made a general settlement with the United States in 1942 for \$23,995,991 in respect of various claims. See 8 Whiteman, *Digest of International Law*, 1101-05. Whiteman also collects the details of the agreements of China (Republic), Denmark, Germany (F.R.), Greece, Ireland, Israel, Italy, Japan, Korea, Netherlands, Nicaragua, Pakistan, Belgium, Luxembourg, Ethiopia, Viet-Nam, Iran, Muscat and Oman and France that just compensation is due for the taking of foreign property, and records agreements to pay compensation, and payment, by Brazil, Mexico, United Arab Republic, Soviet Union, Hungary, Rumania, Bulgaria, Yugoslavia, Czechoslovakia and Poland through the end of the 1960's in considerably more detail than that sketched in respondent's Appendix. 8 Whiteman, *supra*, pp. 1085-1136. It is noteworthy that the Communist countries generally have agreed to compensate foreign interests although from their beginning they have repudiated the applicability of international law to them. Hazard, *Renewed Emphasis on a Socialist International Law*, 65 Am. J. Int'l L. 142 (1971). Perhaps maturity teaches the wisdom of compliance with a rule such as that of compensation, which is for the ultimate mutual benefit of all adherents to the rule, particularly for those desiring to attract foreign investment and international trade.

In its brief, respondent undertook to prove that the United States' view is wrong. It has failed to do so.<sup>10</sup> The

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<sup>10</sup> In reference to respondent's version of the Indonesian Nationalization cases (Resp. Br. p. 44, n. 24), we point out that in the Rome litigation (as in the I.C.J. litigation: Anglo-Iranian Oil Co. Case (*United Kingdom v. Iran*), I.C.J. Rep. (1952) 92), the issue was discrimination against Anglo-Iranian, not whether compensation had been paid or offered. (Cf. Judge Carniero's dissenting opinion in the I.C.J. case, at pp. 151, 159-60, 162 for a cogent statement of the rationale of the compensation rule.) Indeed, in the Venice litigation, *Anglo-Iranian Oil Co. Ltd. v. S.U.P.O.R.*

plain fact is that our courts are in accord with the Executive and the Congress in finding that there are principles of international law, and, in appropriate cases, in disregarding foreign law violating those principles, even though that foreign law might otherwise apply under choice-of-law rules.

As we pointed out in our main brief, every court in the United States that has had occasion to examine Cuban Law of Nationalization No. 851 has found that the seizures of the property of United States nationals pursuant to that law were in violation of international law (Pet. Br. p. 17). This statement is not challenged by respondent.

Respondent's suggestion (Resp. Br. p. 25) that "a most elementary rule of conflicts" requires that the validity of petitioner's claim be governed solely by Cuban law and not be United States law must be rejected in the circumstances of this case. Initially, since both Cuban Law (p. 4, n. 8, *supra*) and United States law provide for compensation there would appear to be no "conflict" of laws, so no "choice" of law is necessary. Even so, in the ordinary choice-of-law case, where the forum must determine which of divergent state laws governs the rights of private liti-

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(*The Miriella*), Italy, Court of Venice (1955) Int'l. I. Rep. 19, 20, 23, the Court noted that Mr. Mossadegh, then head of the Persian Government, had himself offered compensation to Anglo-Iranian, and confirmed his obligation to pay before the International Court of Justice. The High Court of Tokyo, in reviewing the Tokyo District Court decision cited by respondent, indicated that it did not pass on the validity or invalidity of the nationalization law despite the alleged failure to compensate because "we do not think these matters are contrary to the public policy of this country [Japan]." This statement should be contrasted with the public policy of the United States as expressed in the Fifth and Fourteenth Amendments and in the Foreign Assistance Act of 1964 as amended. See, generally, 6 Whiteman, *Digest of International Law*, 1-54; 8 Whiteman, *Digest of International Law*, 1053-1057, 1170-1178, 1095, 1096. Justice White lists other examples of judicial examination of foreign acts of state at 376 U.S., 440, n. 1.



gants, the court's determination is aided by ascertaining and evaluating the importance of the public policy of the forum. Restatement, 2nd, *Conflict of Laws*, § 6(2)(b).<sup>11</sup> In this case the respondent asserts that it is the sole exponent of Cuban law, that such law does not provide for compensation, and that this Court must, without examination, apply whatever rule respondent may, from time to time, designate as Cuban law. Respondent, in short, would deny the existence of any choice of law and insist that its version of Cuban law must be applied by this Court even though to do so would derogate from the public policy of the United States and be contrary to what the Legislative and Executive branches of our Government have declared to be the national interest. In these circumstances, the application of respondent's version of a "most elementary rule of conflicts" would be highly inappropriate. Rather, the respondent's election to seek American law for enforcement of its claim should, as in *National City Bank v. Republic of China*, 348 U.S. 356 (1955), be deemed an acquiescence in the application of American law to petitioner's counterclaim.

Moreover, under the most elementary rules of procedure, respondent has failed to support its assertions as to Cuban law. Petitioner pleaded and proved (A.20-21, 23-24) that Cuban law guarantees it compensation for its seized properties and that under Cuban law the Republic of Cuba is indebted to petitioner in an amount substantially in excess of the amount claimed in the complaint. Upon such pleading and proof, the burden shifted to respondent to come forward with proof (not the assertions of counsel) that Cuban law was not as pleaded and *prima facie* proved by petitioner. This respondent has failed to do and, upon

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<sup>11</sup> Justice White has observed that "American courts have denied recognition or effect to foreign law, otherwise applicable under the conflict of laws rules of the forum, to many foreign laws where these laws are deeply inconsistent with the policy of the forum, notwithstanding that these laws were of obvious political and social importance to the acting country." 376 U.S., 447 (dissenting opinion).

the record in this case, petitioner's counterclaim must be deemed valid under Cuban law, as well as under international law and our law.

The dollar amount of the counterclaim is established by stipulation.<sup>12</sup> Accordingly, respondent's exaggerated concern with the difficulty of fixing the amount when compensation is found to be due has no place in this case; and its elaborately contrived appendix is equally irrelevant. (Resp. Br. pp. 42, 47-57).

2. *The act of state doctrine does not require the Court to grant the relief demanded by the respondent when petitioner has legitimate defenses that would fairly curtail respondent's recovery.* The basic teaching of this Court in *Republic of China* is that a private litigant in our courts, in an action there instituted by a foreign state, is entitled to interpose such legitimate defenses or counterclaims as it may have, not in excess of the amount claimed in the complaint.<sup>13</sup>

The right to interpose a legitimate counterclaim is not, in the circumstances of this case, "an accident of pleading" (Resp. Br. p. 22). It is an essential element of the relationship between the parties. The only significance of the presentation of petitioner's claim as a defense or counterclaim, rather than as an initial pleading, is that under United States law, respondent's governmental immunity was waived by its institution of this lawsuit. Absent sovereign immunity (which respondent now seeks

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<sup>12</sup> The stipulation provides that "if the defendant [petitioner] is lawfully entitled to the offset claimed by it, the amount thereof is such that plaintiff [respondent] will take nothing in this action" (A.4).

<sup>13</sup> *National City Bank v. Republic of China*, 348 U.S. 356 (1955); A.82-86; Memorandum for the United States as Amicus Curiae, p. 4. See, *State of Russia v. Bankers Trust Co.*, 4 F. Supp. 417 (S.D.N.Y. 1933), *aff'd sub nom. United States v. National City Bank*, 83 F.2d 236 (2d Cir. 1936), *cert. den.* 299 U.S. 563.



to reinstate under the guise of the act of state doctrine) petitioner might well have been the initial pleader, faced with an offset or counterclaim by respondent. The shape of the pleadings has nothing to do with the act of state doctrine nor with the validity of the counterclaim.

Congress has said that "no court in the United States shall decline on the ground of the federal act of state doctrine to make a determination on the merits giving effect to the principles of international law . . ." 22 U.S.C. § 2370(e) (2). Respondent assigns three reasons why this Court should disregard that plain mandate of Congress.

First, respondent argues that the statute is unconstitutional. That contention has been made before and has been rejected by the courts as often as made. *Banco Nacional de Cuba v. Farr*, 383 F.2d 166 (2d Cir. 1967), *cert. den.*, 390 U.S. 956 (1968). Secondly, the respondent argues that the mandate of the Hickenlooper Amendment should apply only to claims of title to tangible personal property then physically present in the United States, and not to intangible property owned by United States nationals. Our response to that argument is set forth on pages 11, 12 and 13 of our main brief.

Finally, respondent relies upon the "windfall" argument (Resp. Br. pp. 21-22) first suggested in a dictum of the court of appeals. That dictum, we submit, is without merit or substance. The Executive did not "freeze" Cuban assets until long after petitioners' offset had accrued and had been asserted in this action; and the adjudication of claims against Cuba under the International Claims Settlement Act did not establish a plan for the marshalling of Cuban assets and distribution to creditors.<sup>14</sup> Even

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<sup>14</sup> The purpose of the Act is to provide for the determination of the amount and validity of U.S. claims against Cuba, 22 U.S.C. § 1643. There is no Congressional intent to vest Cuban property. The Senate Foreign Relations Committee struck from the Act

if it had, the petitioner, by analogy to the bankruptcy laws, was entitled to the offset. *Cf.* Bankruptcy Act § 68, 11 U.S.C. § 108. Further, whether or not the determination by the Foreign Claims Settlement Commission is *res judicata*, the allowance of petitioner's claim, after deduction of the offset, is in accord with the policy of the U.S. Government the Commission was directed to administer, 22 U.S.C. §§ 1643, 1643b, 1643e; and it is entirely consistent with the factual basis of petitioner's claim, which has not been contested in this action. Moreover, *any* application of the Hickenlooper Amendment, even to specific tangible property such as sugar or tobacco, necessarily creates a preference for the particular victim of confiscation whose property happens to find its way back to the United States.

The prompt action of petitioner in exercising its offset produced a benefit, rather than a detriment, to unsecured general creditors of Cuba. No "freeze" was imposed on Cuban assets until some three years after the offset was taken. During that time the Castro Government effectively carried out a program of moving its assets (and those taken from its nationals), beyond the borders of the United States. Some \$100 million of assets were thus transferred to Cuban accounts in Canada alone. Note, 42 N.Y.U. J.Int'l L. & Pol. 260, 273 (Summer 1971). If

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§ 1643j(b), which provided for vesting, because of the objection of the Department of State that "to vest and sell Cuban assets would place the Government of the United States in the position of doing what Castro has done. It could cause other governments to question the sincerity of the United States Government in insisting upon respect for property rights." Sen. Rep. No. 701, 89th Cong. 1st Sess., p. 3. The Senate Committee also indicated that assets "wholly or substantially" owned by United States residents should not be blocked at all so no property of a United States citizen could be used to pay the claims of another United States citizen against Cuba. *Id.*, p. 5. It has been pointed out that the purpose of this Act is consistent with our reading of the purpose of the Hickenlooper Amendment, and not contrary to it. Note, 42 N.Y.U. J.Int'l L. & Pol. 260 (Summer, 1971).

petitioners had paid the surplus proceeds of collateral to respondent in 1960, without taking the offset, the money would have been lost both to the petitioner and to other creditors. By taking the offset, petitioner's claim has been ratably reduced, thus increasing the share of unsecured creditors in frozen assets actually available for distribution, if and when Congress adopts a policy for the disposition of such assets.

Respondent's objections to the legitimacy of petitioner's claim can hardly be taken seriously. The claim is for compensation expressly promised by Cuban law,<sup>15</sup> required by principles of international law,<sup>16</sup> and guaranteed by United States law.<sup>17</sup> To allow this claim as an offset against respondent's claim in this case does not call in question the validity of any sovereign act, nor does it reverse or in any way alter the effect of such act on status or property lying outside the jurisdiction of this Court.<sup>18</sup> The intent of Congress that the act of state doctrine should not be applied to bar this petitioner from its day in court is clear.<sup>19</sup> The Executive Branch has formally represented to this Court that the application of the act of state doctrine is not in the national interest, and that its application by a majority of the court below "seriously impairs the power of the Executive over the control of foreign affairs. . . ."<sup>20</sup>

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<sup>15</sup> (A. 20); cf. Pet. Br. p. 19; note 8, *supra*.

<sup>16</sup> Pp. 2-7, *supra*.

<sup>17</sup> Pet. Br. pp. 18-20.

<sup>18</sup> The *Sabbatino* opinion was directed only to "the *validity* of a taking of property within its own territory by a foreign sovereign government" [emphasis added], not to the questions of indemnity or compensation due. 376 U.S., 428.

<sup>19</sup> (A. 39-45); Appendix G to Petition for Writ of Certiorari (70-295); see the authorities listed at p. 12, n. 5 of our main brief for an extensive listing of legislative history in support of this proposition.

<sup>20</sup> (A. 82-86); Memorandum for United States as Amicus Curiae, p. 2.

Respondent's argument that the Court *must* nevertheless apply the doctrine in this case is supported neither by authority<sup>21</sup> nor by reason.<sup>22</sup> On analysis, respondent's arguments are reduced to absurdities: that the independence of the Judicial branch requires abdication of the judicial function<sup>23</sup> and that the doctrine of separation of powers requires internecine confrontation between coordinate branches of our government.<sup>24</sup> In the light of the principles laid down by this Court in *Republic of China*, the Congressional declaration of accepted principles of international law as the law of the United States, and the

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<sup>21</sup> See Pet. Br. p. 9. Respondent's reliance upon *Pons v. Republic of Cuba*, 294 F.2d 925 (D.C. Cir. 1961), *cert. den.* 368 U.S. 960 (1962) is misplaced and its statement of that case (Resp. Br. p. 9) is misleading. Pons was a Cuban national and an agent of the Cuban government, stationed in the United States. Cuba filed, in the District Court for the District of Columbia, a claim against Pons for \$120,000. Pons responded by claiming that some \$63,500 had been paid by him in discharge of a debt of Cuba; he deposited the balance (\$56,454.72) in the Court's registry and asserted a counterclaim of \$66,500, being the value of property in Cuba which he alleged the Cuban government had taken from him "without any legal justification and without due process of law". 294 F.2d 925, at 926. The District Court dismissed that counterclaim and the Court of Appeals affirmed, on the ground that what another country has done in the way of taking over property of its nationals is not a matter for judicial consideration in the United States. 294 F.2d at 926, citing *United States v. Belmont*, 301 U.S. 324, (1937), 332. The District Court left undecided Cuba's claim for the additional amount (\$63,545.28) for which, in effect, Pons had successfully claimed an offset. In these circumstances, *Pons* provides no support for respondent's arguments as to the act of state doctrine and respondent's representation (Resp. Br. p. 14) that "the facts in the *Pons* case were the same as in the present case save the party in office has changed" is not correct.

<sup>22</sup> "[T]he majority, by applying the act of state doctrine after an independent evaluation of the merits of the State Department's decision, is usurping the same executive prerogative which it is the function of that doctrine to preserve." A.87. (Hays, J.).

<sup>23</sup> See Resp. Br. pp. 8-15. *But see* Memorandum for United States as Amicus Curiae, pp. 2, 3; A.86, 87.

<sup>24</sup> Resp. Br. pp. 11, 12, 14, 15.

supervening and explicit statement of Executive policy, the act of state doctrine should not be applied to deprive petitioner of its legitimate counterclaim in this case.

3. *The District Court correctly found that the government of Cuba and Banco Nacional are one and the same for purposes of this litigation.* Respondent repeatedly asserts that Banco Nacional is not responsible for the debts of Cuba. Respondent also asserts in its Point VI that "respondent is suing in its own right". The first of these assertions is irrelevant and the second is contrary to the facts established in the record and found by the district court.

The suit was brought to recover surplus proceeds of collateral pledged for a loan made in 1958 in the initial principal amount of \$15 million, which was, in 1960, reduced to \$10 million by a payment of \$5 million. The documentation for the loan gave the name of the borrower as Banco de Desarrollo Economico y Social (hereinafter "Bandes") but the securities were pledged by Fondo de Establizacion de la Moneda (hereinafter "Fondo"). Both Bandes and Fondo were "institutions of the Republic of Cuba" (A. 12).

There is no dispute as to the events in connection with the seizure by Cuba of the Bank's eleven branches, nor as to the chronology of those events. The Bank's branches were seized on September 16, 1960 and were turned over to respondent, which is still in possession and control of those properties.<sup>25</sup> On September 23, 1960, the Bank, by cable, advised the respondent, which was the fiscal agent of Cuba in this transaction, that collateral held as security for the Bandes note had been sold, and the proceeds had been applied against principal and interest.<sup>26</sup> On October

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<sup>25</sup> Second amended reply, par. 9 (A.30); Pet. Br. pp. 5, 3a; Cuban Executive Power Resolution No. 2 (Def. Mot. Exh. 22) (A.42, n. 6).

<sup>26</sup> Amended complaint, par. 8 (A.12).



13, 1960 Fondo was dissolved and the rights of Fondo in the collateral were transferred to the respondent by action of the Cuban Government.<sup>27</sup>

It is thus apparent that respondent claims as agent for or as the assignee and transferee of the Government of Cuba. The assertion now made in respondent's brief that Banco Nacional de Cuba is "suing in its own right" is nothing less than astounding, in light of its allegation in *Sabbatino* that it is a "public corporation wholly owned by the government" of Cuba<sup>28</sup> and the provisions of Cuban Law No. 891, dated October 14, 1960 (Def. Mot. Exh. 10) which declared:

The banking function is hereby declared of public interest and, from this moment on, only the State shall be authorized to exercise it through the organizations created for that purpose . . .

It is hereby ordered that the nationalization and subsequent assignment in favor of the Cuban State, ordered in the foregoing Article, be carried out through the National Bank of Cuba, as an autonomous organization in charge of directing the banking function of the State. Therefore, the National Bank of Cuba is hereby declared the legal successor, subrogated in place and stead of the individuals and juridical persons referred to in Article 2 of this Law, with respect to all property, rights and rights of action mentioned, and the entire assets and liabilities of the banking institution object of this Law are hereby transferred to the same National Bank.

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<sup>27</sup> Amended complaint, par. 10 (A. 13).

<sup>28</sup> 27 F.R.D. 255, 258 (S.D.N.Y. 1961). The cases cited in Point V of respondent's brief are irrelevant where, as here, the public corporation sues on behalf of the government and the counterclaim is asserted against the government.

Respondent's arguments bear little resemblance to the facts as alleged in its amended complaint (A. 11-13). The complaint alleges that the United States Government securities, which were pledged to petitioner, were owned by Fondo. Fondo was an institution of the Republic of Cuba.<sup>29</sup> Respondent's role in the loan and pledge transaction was that of agent and not of principal. It is alleged in the amended complaint (A.11) that respondent was "authorized to administer the . . . foreign credit operations of the Republic of Cuba as its agent . . ."

Thus, at all times, from the inception of the transaction to the date when petitioner exercised its right of offset, the collateral pledged to petitioner belonged to the Republic of Cuba, was pledged by an institution of the Republic of Cuba engaged in the performance of governmental functions, and was at no time part of the "patrimony" of respondent as "an autonomous entity". The complaint goes on to allege that on or about October 13, 1960, the Cuban government dissolved Fondo and transferred to respondent all of Fondo's rights and obligations, presumably including such claims as the Cuban government had to the proceeds of its collateral pledged with petitioner. This lawsuit was not commenced until November 28, 1960, when the Cuban government had completed such cosmetic changes as it deemed necessary to put the best possible face on respondent's claims in this case.

Judge Bryan found, on ample evidence, that "any doubts as to the organic relationship between plaintiff and the Cuban government are removed by an examination of the local laws defining the function and authority of Banco Nacional which "alone has exclusive charge of directing the banking function of the state." Indeed, the record compels the conclusion that the Cuban government's official

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<sup>29</sup> In English translation, Fondo de Establizacion de la Moneda (Fondo) means "Monetary Stabilization Fund".



insistence upon the pretense that respondent is "an autonomous entity" is, at best, a transparent fiction, and, at worst, a deliberate imposture on the Court.

We respectfully submit, however, that this line of inquiry need not detain the Court because the record shows, without contradiction, that at all material times the pledged collateral and the claim for its proceeds was and is Cuban government property. The record fully establishes that "this action is brought by and for the benefit of the Republic of Cuba by and through its agent . . . which is in fact and law and in form and function an integral part of and indistinguishable from the Republic of Cuba" (A. 17). As Banco Nacional is an agent and the Cuban government is a principal, it is not necessary to determine whether Banco Nacional has an independent corporate *persona*. The inevitable conclusion is that "the Government of Cuba and Banco Nacional are indistinguishable entities for purposes of this lawsuit" (A. 37, n. 3).

Respondent's argument that the Republic of Cuba is not "an opposing party" (Resp. Br. Pt. VI) may be summarily dismissed. Respondent sues here, in its capacity as a Cuban government instrumentality, to recover a sum of money allegedly due to the Cuban government. And it is in precisely that capacity that the counterclaim is asserted against it. Petitioner and the Cuban government are opposing parties. That fact should not be obscured because the Cuban government chooses to use an alias.

## CONCLUSION

The judgment below should be reversed and the judgments of the District Court reinstated.

Respectfully submitted,

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February 8, 1972



NOTE: Where it is deemed desirable, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337.

# SUPREME COURT OF THE UNITED STATES

## Syllabus

### FIRST NATIONAL CITY BANK *v.* BANCO NACIONAL DE CUBA

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR  
THE SECOND CIRCUIT

No. 70-295. Argued February 22, 1972—Decided June 7, 1972

This case involves a claim by respondent for excess collateral it had pledged with petitioner to secure a loan, and a counterclaim by petitioner for that excess as an offset against the value of petitioner's property in Cuba expropriated by Cuba without compensation. The District Court recognized that this Court's decision in *Banco Nacional de Cuba v. Sabbatino*, 376 U. S. 398, holding that generally the courts of one nation will not sit in judgment on the acts of another nation within the latter's territory (act of state doctrine) would bar assertion of the counterclaim but concluded that *post-Sabbatino* congressional enactments had in effect overruled that decision. The court issued summary judgment for petitioner on all issues except the amount available for possible setoff. The Court of Appeals reversed, holding that *Sabbatino* barred assertion of the counterclaim. *Held*: The judgment is reversed. Pp. 2—.

MR. JUSTICE REHNQUIST, joined by THE CHIEF JUSTICE and MR. JUSTICE WHITE, concluded that since the Executive Branch, which is charged with the primary responsibility for the conduct of foreign affairs, has (contrary to the position it took in *Sabbatino*) expressly represented to the Court that the application of the act of state doctrine in this case would not advance the interests of American foreign policy, the decision in *Bernstein v. Nederlandsche Amerikaansche*, 210 F. 2d 375, should be adopted and approved, thus permitting judicial examination of the legal issues raised by the act of a foreign sovereign within its own territory. Pp. 2-11.

MR. JUSTICE DOUGLAS concluded that the central issue in this case is governed by *National City Bank v. Republic of China*, 348 U. S. 356 (holding that a sovereign's claim may be offset by

II FIRST NAT. CITY BANK v. BANCO NACIONAL DE CUBA

Syllabus

a counterclaim or setoff) rather than by the *Bernstein* exception to *Sabbatino*, and accordingly would allow the setoff up to the amount of respondent's claim. Pp. 1-4.

MR. JUSTICE POWELL, believing that *Sabbatino's* broad holding was not compelled by the principles underlying the act of state doctrine, concluded that federal courts have an obligation to hear cases such as this one and to apply applicable international law. Pp. 1-4.

442 F. 2d 530, reversed and remanded.

REHNQUIST, J., announced the Court's judgment and delivered an opinion in which BURGER, C. J., and WHITE, J., joined. DOUGLAS, J., filed an opinion concurring in the result. POWELL, J., filed an opinion concurring in the judgment. BRENNAN, J., filed a dissenting opinion, in which STEWART, MARSHALL, and BLACKMUN, JJ., joined.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

## SUPREME COURT OF THE UNITED STATES

No. 70-295

First National City Bank, Petitioner, v. Banco Nacional de Cuba.	} On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.
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[June 7, 1972]

MR. JUSTICE REHNQUIST announced the judgment of the Court, and delivered an opinion in which THE CHIEF JUSTICE and MR. JUSTICE WHITE join.

In July 1958, petitioner loaned the sum of \$15 million to a predecessor of respondent. The loan was secured by a pledge of United States Government bonds. The loan was renewed the following year, and in 1960 \$5 million was repaid, the \$10 million balance was renewed for one year, and collateral equal to the value of the portion repaid was released by petitioner.

Meanwhile, on January 1, 1959, the Castro government came to power in Cuba. On September 16, 1960, the Cuban militia, allegedly pursuant to decrees of the Castro government, seized all of the branches of petitioner located in Cuba. A week later the bank retaliated by selling the collateral securing the loan, and applying the proceeds of the sale to repayment of the principal and unpaid interest. Petitioner concedes that an excess of at least \$1.8 million over and above principal and unpaid interest was realized from the sale of the collateral. Respondent sued petitioner in the Federal District Court to recover this excess, and petitioner, by way of set-off and counterclaim asserted the right to recover damages as a result of the expropriation of its property in Cuba.

The District Court recognized that our decision in *Banco Nacional de Cuba v. Sabbatino*, 376 U. S. 398 (1964), holding that generally the courts of one nation will not sit in judgment on the acts of another nation within its own territory would bar the assertion of the counterclaim, but it further held that congressional enactments since the decision in *Sabbatino* had "for all practical purposes" overruled that case. Following summary judgment in favor of the petitioner in the District Court on all issues except the amount by which the proceeds of the sale of collateral exceeded the amount which could properly be applied to the loan by petitioner, the parties stipulated that in any event this difference was less than the damages which petitioner could prove in support of its expropriation claim if that claim were allowed. Petitioner then waived any recovery on its counterclaim over and above the amount recoverable by respondent on its complaint, and the District Court then rendered judgment dismissing respondent's complaint on the merits.

On appeal, the Court of Appeals for the Second Circuit held that the congressional enactments relied upon by the District Court did not govern this case, and that our decision in *Sabbatino* barred the assertion of petitioner's counterclaim. We granted certiorari and vacated the judgment of the Court of Appeals for consideration of the views of the Department of State which had been furnished to us following the filing of the petition for certiorari. 400 U. S. 1019 (1971). Upon reconsideration, the Court of Appeals by a divided vote adhered to its earlier decision. We again granted certiorari. 404 U. S. 820.

We must here decide whether, in view of the substantial difference between the position taken in this case by the Executive Branch and that which it took in *Sabbatino*, the act of state doctrine prevents petitioner



from litigating its counterclaim on the merits. We hold that it does not.

The separate lines of cases enunciating both the act of state and sovereign immunity doctrines have a common source in the case of *The Schooner Exchange* v. *M'Faddon*, 7 Cranch 116, 146 (1812). There Chief Justice Marshall stated the general principle of sovereign immunity: that sovereigns are not presumed without explicit declaration to have opened their tribunals to suits against other sovereigns. Yet the policy considerations at the root of this fundamental principle are in large part also the underpinnings of the act of state doctrine. The Chief Justice observed:

"The arguments in favor of this opinion which have been drawn from the general inability of the judicial power to enforce its decisions in cases of this description, from the consideration, that *the sovereign power of the nation is alone competent to avenge wrongs committed by a sovereign*, that the questions to which such wrongs give birth are rather *questions of policy than of law*, that they are for diplomatic, rather than legal discussion, are of great weight, and merit serious attention." (Emphasis added.)

Thus both the act of state and sovereign immunity doctrines are judicially created to effectuate general notions of comity among nations and among the respective branches of the Federal Government. The history and the legal basis of the act of state doctrine are treated comprehensively in the Court's opinion in *Sabbatino*, *supra*. The Court there cited Chief Justice Fuller's "classic American statement" of the doctrine, found in *Underhill* v. *Hernandez*, 168 U. S. 250, 252:

"Every sovereign state is bound to respect the independence of every other sovereign state, and the

courts of one country will not sit in judgment on the acts of the government of another done within its one territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves."

The act of state doctrine represents an exception to the general rule that a court of the United States, where appropriate jurisdictional standards are met, will decide cases before it by choosing the rules appropriate for decision from among various sources of law including international law. *The Paquete Habana*, 175 U. S. 677. The doctrine precludes any review whatever of the acts of the government of one sovereign State done within its own territory by the courts of another sovereign State. It is clear however from both history and the opinions of this Court that the doctrine is not an inflexible one. Specifically, the Court in *Sabbatino* described the act of state doctrine as "a principle of decision binding on federal and state courts alike but compelled by neither international law nor the Constitution," 376 U. S., at 427, and then continued:

"... its continuing vitality depends on its capacity to reflect the proper distribution of the functions between the judicial and political branches of the government on matters bearing upon foreign affairs." 376 U. S., at 427-428.

In *Sabbatino*, the Executive Branch of this Government, speaking through the Department of State, advised attorneys for *amici* in a vein which the Court described as being "intended to reflect no more than the Department's then wish not to make any statement bearing on this litigation." 376 U. S., at 420. The United States argued before this Court in *Sabbatino* that the Court

should not "hold for the first time that Executive silence regarding the act of state doctrine is equivalent to executive approval of judicial inquiry into the foreign act."

In the case now before us, the Executive Branch has taken a quite different position. The Legal Adviser of the Department of State advised this Court on November 17, 1970, that as a matter of principle where the Executive publicly advises the Court that the act of state doctrine need not be applied, the Court should proceed to examine the legal issues raised by the act of a foreign sovereign within its own territory as it would any other legal question before it. His letter refers to the decision of the Court below in *Bernstein v. N. V. Nederlandsche Amerikaansche, etc.*, 210 F. 2d 375 (CA2 1954), as representing a judicial recognition of such a principle, and suggests that the applicability of the principle was not limited to the *Bernstein* case. The Legal Adviser's letter then goes on to state:

"The Department of State believes that the act of state doctrine should not be applied to bar consideration of a defendant's counterclaim or set off against the government of Cuba in this or like cases."

The question which we must now decide is whether the so-called *Bernstein* exception to the act of state doctrine should be recognized in the context of the facts before the Court. In *Sabbatino*, the Court said:

"This Court has never had occasion to pass upon the so-called *Bernstein* exception, nor need it do so now."  
376 U. S., at 420.

The act of state doctrine, like the doctrine of immunity for foreign sovereigns, has its roots not in the Constitution, but in the notion of comity between independent sovereigns. *Sabbatino, supra*, 376 U. S., at 438; *Na-*

*tional City Bank v. Republic of China*, 348 U. S. 356; *The Schooner Exchange v. McFaddon*, 7 Cranch 116.<sup>1</sup> It is also buttressed by judicial deference to the exclusive power the Executive over conduct of relations with other sovereign power and the power of the Senate to advise and consent on the making of treaties. The issues presented by its invocation are therefore quite dissimilar to those raised in *Zschernig v. Miller*, 389 U. S. 429 (1968), where the Court struck down an Oregon statute that was held to be "an intrusion by the State into the field of foreign affairs which the Constitution entrusts to the President and Congress." 389 U. S., at 432.

The line of cases from this Court establishing the act of state doctrine justify its existence primarily on the basis that juridical review of acts of state of a foreign power could embarrass the conduct of foreign relations by the political branches of the government. The Court's opinion in *Underhill*, *supra*, stressed the fact that the revolutionary government of Venezuela had been recognized by the United States. In *Oetjen v. Central Leather Co.*, 246 U. S. 297, 302, the Court was explicit:

"The conduct of the foreign relations of our government is committed by the Constitution to the ex-

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<sup>1</sup> In the latter case, speaking of sovereign immunity, Chief Justice Marshall said:

"It seems, then, to the Court, to be a principle of public law, that national ships of war, entering the port of a friendly power, open for their reception, are to be considered as exempted by the consent of that power from its jurisdiction. Without doubt, the sovereign of the place is capable of destroying this implication. He may claim and exercise jurisdiction, either by employing force, or by subjecting such vessels to the ordinary tribunals. But until such power be exerted in a manner not to be misunderstood, the sovereign cannot be considered as having imparted to the ordinary tribunals a jurisdiction, which it would be a breach of faith to exercise." 7 Cranch, at 145-146.

ecutive and legislative—"the political"—departments of the government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision . . . . It has been specifically decided that 'who is the sovereign *de jure* or *de facto*, of a territory is not a judicial, but is a political question, the determination of which by the legislative and executive departments of any government conclusively binds the judges, as well as all other officers, citizens and subjects of that government."

*United States v. Belmont*, 301 U. S. 324, is another case that emphasized the exclusive competence of the executive branch in the field of foreign affairs.<sup>2</sup> A year earlier, the Court in *United States v. Curtiss-Wright Corp.*, 299 U. S. 304, 319, had quoted with approval the statement of John Marshall when he was a member of the House of Representatives dealing with this same subject:

"The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations."

The opinion of Scrutton, L. J., in *Luther v. James Sager and Co.* [1921] 3 K. B. 532, described in *Sabbatino* as a "classic case" articulating the act of state doctrine "in terms not unlike those of the United States cases," strongly suggests that under the English doctrine the executive by representation to the courts may waive the application of the doctrine:

"But it appears a serious breach of international comity, if a state is recognized as a sovereign inde-

<sup>2</sup> "Governmental power over external affairs is not distributed, but is vested exclusively in the national government. And in respect of what was done here, the executive had authority to speak as the sole organ of that government." 301 U. S., at 330.

pendent state, to postulate that its legislation is 'contrary to essential principles of justice and morality.' Such an allegation might well with a susceptible foreign government become a *casus belli*; and should in my view be the action of the Sovereign through his ministers, and not of the judges in reference to a state which their sovereign has recognized. . . .

"The responsibility for recognition or non-recognition with the consequences of each rests on the political advisors of the sovereign and not on the judges." 3 K. B., at 559.

We think that the examination of the foregoing cases indicates that this Court has recognized the primacy of the Executive in the conduct of foreign relations quite as emphatically as it has recognized the act of state doctrine. The Court in *Sabbatino* throughout its opinion emphasized the lead role of the executive in foreign policy, particularly in seeking redress for American nationals who had been the victims of foreign expropriation, and concluded that any exception to the act of state doctrine based on a mere silence or neutrality on the part of the executive might well lead to a conflict between the executive and judicial branches. Here, however, the Executive Branch has expressly stated that an inflexible application of the act of state doctrine by this Court would not serve the interests of American foreign policy.

The act of state doctrine is grounded on judicial concern that application of customary principles of law to judge the acts of a foreign sovereign might frustrate the conduct of foreign relations by the political branches of the government. We conclude that where the Executive Branch, charged as it is with primary responsibility for the conduct of foreign affairs, expressly represents to the Court that the act of state doctrine would not



advance the interests of American foreign policy, that doctrine should not be applied by the courts. In so doing, we of course adopt and approve the so-called *Bernstein* exception to the act of state doctrine. We believe this to be no more than an application of the classical common-law maxim that "the reason of the law ceasing, the law itself also ceases" (Black's Law Dictionary, p. 288).

Our holding is in no sense an abdication of the judicial function to the Executive Branch. The judicial power of the United States extends to this case, and the jurisdictional standards established by Congress for adjudication by the federal courts have been met by the parties. The only reason for not deciding the case by use of otherwise applicable legal principles would be the fear that legal interpretation by the judiciary of the act of a foreign sovereign within its own territory might frustrate the conduct of this country's foreign relations. But the branch of the government responsible for the conduct of those foreign relations has advised us that such a consequence need not be feared in this case. The judiciary is therefore free to decide the case free from the limitations that would otherwise be imposed upon it by the judicially created act of state doctrine.

It bears noting that the result we reach is consonant with the principles of equity set forth by the Court in *National City Bank of New York v. Republic of China*, 348 U. S. 356. Here respondent, claimed by petitioner to be an instrument of the government of Cuba, has sought to come into our courts and secure an adjudication in its favor, without submitting to decision on the merits of the counterclaim which respondent asserts against it. Speaking of a closely analogous situation in *Republic of China, supra*, the Court said:

"We have a foreign government invoking our law but resisting a claim against it which fairly would



curtail its recovery. It wants our law, like any other litigant, but it wants our law free from the claims of justice. It becomes vital, therefore, to examine the extent to which the considerations which led this Court to bar a suit against a sovereign in *The Schooner Exchange* are applicable here to foreclose the Court from determining, according to prevailing law, whether the Republic of China's claim against the National City Bank would be unjustly enforced by disregarding legitimate claims against the Republic of China. As expounded in *The Schooner Exchange*, the doctrine is one of implied consent by the territorial sovereign to exempt the foreign sovereign from its 'exclusive and absolute' jurisdiction, the implication deriving from standards of public morality, fair dealing, reciprocal self-interest, and respect for the 'power and dignity' of the foreign sovereign."

The act of state doctrine, as reflected in the cases culminating in *Sabbatino*, is a judicially accepted limitation on the normal adjudicative processes of the courts, springing from the thoroughly sound principle that on occasion individual litigants may have to forego decision on the merits of their claims because the involvement of the courts in such a decision might frustrate the conduct of the Nation's foreign policy. It would be wholly illogical to insist that such a rule, fashioned because of fear that adjudication would interfere with the conduct of foreign relations, be applied in the face of an assurance from that branch of the Federal Government which conducts foreign relations that such a result would not obtain. Our holding confines the courts to adjudication of the case before them, and leaves to the Executive Branch the conduct of foreign relations. In so doing, it is both faithful to the principle of separation of powers

and consistent with earlier cases applying the act of state doctrine where we lacked the sort of representation from the Executive Branch which we have in this case.

We therefore reverse the judgment of the Court of Appeals, and remand the case to it for consideration of respondent's alternative bases of attack on the judgment of the District Court.

*Reversed.*



# SUPREME COURT OF THE UNITED STATES

No. 70-295

First National City Bank,	{	On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.
Petitioner,		
v.		
Banco Nacional de Cuba.		

[June 7, 1972]

MR. JUSTICE DOUGLAS, concurring in the result.

*Banco Nacional de Cuba v. Sabbatino*, 376 U. S. 398, does not control the central issue in the present case. Rather, it is governed by *National City Bank v. Republic of China*, 348 U. S. 356.

I start from the premise that the plaintiff in the present litigation is properly in the District Court. Respondent, who brought this suit, is for our purposes the sovereign state of Cuba; and, apart from cases where another nation is at war with the United States, it is settled that sovereign states are allowed to sue in the courts of the United States. See *Banco Nacional de Cuba v. Sabbatino*, 376 U. S. 398, 408-410.

Cuba sues here to recover the difference between a loan made by petitioner and the proceeds of a sale of the collateral securing the loan. The excess allegedly is about \$1.8 million. Petitioner sought to setoff against that amount claims arising out of the confiscation of petitioner's Cuban properties. How much those setoffs would be, we do not know. The District Court ruled that the amount of these setoffs "cannot be determined on these motions," 270 F. Supp. 1004, 1011, saying that they represented "triable issues of fact and law." *Ibid*.

I would reverse the Court of Appeals and affirm the District Court, remanding the case for trial on the

amount of the setoff and I would allow the setoff up to the amount of respondent's claim.

It was ruled in the *Republic of China* case that a sovereign's claim may be cut down by a counterclaim or setoff. 348 U. S., at 364. The setoff need not be "based on the subject matter of the claim asserted in the strict sense." The test is "the consideration of fair dealing." *Id.*, at 365. The Court said:

"The short of the matter is that we are not dealing with an attempt to bring a recognized foreign government into one of our courts as a defendant and subject it to the rule of law to which nongovernmental obligors must bow. We have a foreign government invoking our law but resisting a claim against it which fairly would curtail its recovery. It wants our law, like any other litigant, but it wants our law free from the claims of justice. It becomes vital, therefore, to examine the extent to which the considerations which led this Court to bar a suit against a sovereign in *The Schooner Exchange* [7 Cranch 116] are applicable here to foreclose a court from determining, according to prevailing law, whether the Republic of China's claim against the National City Bank would be unjustly enforced by disregarding legitimate claims against the Republic of China. As expounded in *The Schooner Exchange*, the doctrine is one of implied consent by the territorial sovereign to exempt the foreign sovereign from its 'exclusive and absolute' jurisdiction, the implication deriving from standards of public morality, fair dealing, reciprocal self-interest, and respect for the 'power and dignity' of the foreign sovereign." *Id.*, at 361-362.

It would offend the sensibilities of nations if one country, not at war with us, had our courthouse door

closed to it. It would also offend our sensibilities if Cuba could collect the amount owed on liquidation of the collateral for the loan and not be required to account for any setoff. To allow recovery without more would permit Cuba to have her cake and eat it too. Fair dealing requires allowance of the setoff to the amount of the claim on which this suit is brought—a precept that should satisfy any so-called rational decision.

If the amount of the setoff exceeds the asserted claim, then we would have a *Sabbatino* type of case. There the fund in controversy was the proceeds of sugar which Cuba had nationalized. *Sabbatino* held that the issue of who was the rightful claimant was a “political question,” as its resolution would result in ideological and political clashes between nations which must be resolved by the other branches of government.<sup>1</sup> We would have that type of controversy here, if and to the extent that the setoff asserted exceeds the amount of Cuba’s claim. I would disallow the judicial resolution of that dispute for the reasons stated in *Sabbatino* and by MR. JUSTICE BRENNAN in the instant case. As he states, the Executive Branch “cannot by simple stipulation change a political question into a cognizable claim.” But I would allow the setoff to the extent of the claim asserted by Cuba because Cuba is the one who asks our judicial aid in collecting its debt from petitioner and as the *Republic of China* case says “fair dealing” requires recognition of any counterclaim or setoff that eliminates or reduces that claim.<sup>2</sup> It is that principle, not the *Bernstein*<sup>3</sup> exception, which

<sup>1</sup> An historic instance of the resolution of such a conflict ultimately enforced by judicial sanctions is *United States v. Pink*, 315 U. S. 203.

<sup>2</sup> Cf. *Pons v. Republic of Cuba*, 294 F. 2d 925.

<sup>3</sup> *Bernstein v. Nederlandsche-Amerikaansche*, 210 F. 2d 375.

4 FIRST NAT. CITY BANK v. BANCO NACIONAL DE CUBA

should govern here. Otherwise the Court becomes a mere errand boy for the Executive which may choose to pick some people's chestnuts from the fire, but not others.<sup>4</sup> 7

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<sup>4</sup> "The history of the doctrine indicates that its function is not to effect unquestioning judicial deference to the Executive, but to achieve a result under which diplomatic rather than judicial channels are used in the disposition of controversies between sovereigns." Delson, *The Act of State Doctrine—Judicial Reference or Abstinence?* 66 *Amer. J. Int. L.*, p. 83 (1972).



# SUPREME COURT OF THE UNITED STATES

No. 70-295

First National City Bank,	}	On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.
Petitioner,		
v.		
Banco Nacional de Cuba.		

[June 7, 1972]

MR. JUSTICE POWELL, concurring in the judgment.

Although I concur in the judgment of reversal and remand, my reasons differ from those expressed by MR. JUSTICE REHNQUIST and MR. JUSTICE DOUGLAS. While *Banco Nacional de Cuba v. Sabbatino*, 376 U. S. 398, 419-420 (1964), technically reserves the question of the validity of the *Bernstein* exception, as MR. JUSTICE BRENNAN notes in his dissenting opinion, the reasoning of *Sabbatino* implicitly rejects that exception. Moreover, I would be uncomfortable with a doctrine which would require the judiciary to receive the executive's permission before invoking its jurisdiction. Such a notion, in the name of the doctrine of separation of powers, seems to me to conflict with that very doctrine.

Nor do I find *National City Bank v. Republic of China*, 348 U. S. 356 (1955), to be dispositive. The Court there dealt with the question of jurisdiction over the parties to hear a counterclaim asserted against a foreign State seeking redress in our courts. Jurisdiction does not necessarily imply that a court may hear a counterclaim which would otherwise be nonjusticiable. Jurisdiction and justiciability are, in other words, different concepts. One concerns the court's power over the parties; the other concerns the appropriateness of the subject matter for judicial resolution. Although attracted by the justness of the result he reaches, I find little support for MR. JUSTICE DOUGLAS' theory that

the counterclaim is justiciable up to, but no further than, the point of setoff.

I nevertheless concur in the judgment of the Court because I believe that the broad holding of *Sabbatino*<sup>1</sup> was not compelled by the principles, as expressed therein, which underly the act of state doctrine. As Mr. Justice Harlan stated in *Sabbatino*, the act of state doctrine is not dictated either by "international law [or] the Constitution," but is based on a judgment as to "the proper distribution of functions between the judicial and the political branches of the government on matters bearing upon foreign affairs." 376 U. S., at 427-428. Moreover, as noted in *Sabbatino*, there was no intention of "laying down or reaffirming an inflexible and all-encompassing rule. . . ." *Id.*, at 428.

I do not disagree with these principles, only with the broad way in which *Sabbatino* applied them. Had I been a member of the *Sabbatino* Court, I probably would have joined the dissenting opinion of MR. JUSTICE WHITE. The balancing of interests, recognized as appropriate by *Sabbatino*, requires a careful examination of the facts in each case and of the position, if any, taken by the political branches of government. I do not agree, however, that balancing the functions of the judiciary and those of the political branches compels the judiciary to eschew acting in all cases in which the underlying issue is the validity of expropriation under customary international law. Such a result would be an abdication of the judiciary's responsibility to persons

<sup>1</sup> The holding was "that the Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign government, extant and recognized by this country at the time of suit, in the absence of a treaty or other unambiguous agreement regarding controlling legal principles, even if the complaint alleges that the taking violates customary international law." 376 U. S., at 428.

who seek to resolve their grievances by the judicial process.

Nor do I think the doctrine of separation of powers dictates such an abdication. To so argue is to assume that there is no such thing as international law but only international political disputes than can be resolved only by the exercise of power. Admittedly, international legal disputes are not as separable from politics as are domestic legal disputes, but I am not prepared to say that international law may never be determined and applied by the judiciary where there has been an "act of state."<sup>2</sup> Until international tribunals command a wider constituency, the courts of various countries afford the best means for the development of a respected body of international law. There is less hope for progress in this long neglected area if the resolution of all disputes involving "an act of state" is relegated to political rather than judicial processes.

Unless it appears that an exercise of jurisdiction would interfere with delicate foreign relations conducted by the political branches, I conclude that federal courts have an obligation to hear cases such as this. This view is not inconsistent with the basic notion of the act of state doctrine which requires a balancing of the roles of the judiciary and the political branches. When it is shown that a conflict in those roles exists, I believe that the judiciary should defer because, as the Court

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<sup>2</sup> MR. JUSTICE WHITE's opinion in *Sabbatino*, citing cases from England, the Netherlands, Germany, Japan, Italy, and France, states:

"No other civilized country has found such a rigid rule [as that announced in *Sabbatino*] necessary for the survival of the executive branch of its government; the executive of no other government seems to require such insulation from international law adjudications in its courts; and no other judiciary is apparently so incompetent to ascertain and apply international law." 376 U. S., at 440 (footnote omitted).

4 FIRST NAT. CITY BANK v. BANCO NACIONAL DE CUBA

suggested in *Sabbatino*, the resolution of one dispute by the judiciary may be outweighed by the potential resolution of multiple disputes by the political branches.

In this case where no such conflict has been shown, I think the courts have a duty to determine and apply the applicable international law. I therefore join in the Court's decision to remand the case for further proceedings.

# SUPREME COURT OF THE UNITED STATES

No. 70-295

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[June 7, 1972]

MR. JUSTICE BRENNAN, with whom MR. JUSTICE STEWART, MR. JUSTICE MARSHALL, and MR. JUSTICE BLACKMUN join, dissenting.

The Court today reverses the judgment of the Court of Appeals for the Second Circuit that declined to engraft the so-called "*Bernstein*" exception upon the act of state doctrine as expounded in *Banco Nacional de Cuba v. Sabbatino*, 376 U. S. 398 (1964).<sup>1</sup> The Court,

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<sup>1</sup> "The classic American statement of the act of state doctrine, which appears to have taken root in England as early as 1674 . . . and began to emerge in the jurisprudence of this country in the late eighteenth and early nineteenth centuries, . . . is found in *Underhill v. Hernandez*, 168 U. S. 250 [1897], where Chief Justice Fuller said for a unanimous Court (p. 252):

"Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves." *Banco Nacional de Cuba v. Sabbatino*, 376 U. S. 398, 416 (1964).

The so-called "*Bernstein*" exception to this principle derives from *Bernstein v. N. Y. Nederlandsche-Amerikaansche*, 210 F. 2d 375 (1954), where the Court of Appeals for the Second Circuit allowed the plaintiff to challenge the validity of the expropriation of his

nevertheless, affirms the Court of Appeals rejection of the "*Bernstein*" exception. Four of us in this opinion unequivocally take that step, as do MR. JUSTICE DOUGLAS and MR. JUSTICE POWELL in their separate concurring opinions.

The anomalous remand for further proceedings results because three colleagues, MR. JUSTICE REHNQUIST, joined by THE CHIEF JUSTICE and MR. JUSTICE WHITE, adopt the contrary position, while MR. JUSTICE DOUGLAS finds *National City Bank v. Republic of China*, 348 U. S. 356 (1955), dispositive in the circumstances of this case and MR. JUSTICE POWELL rejects the specific holding in *Sabbatino*, believing it was not required by the principles underlying the act of state doctrine.

MR. JUSTICE REHNQUIST's opinion reasons that the act of state doctrine exists primarily, and perhaps even solely, as a judicial aid to the Executive to avoid embarrassment for the political branch in the conduct of foreign relations. Where the Executive expressly indicates that

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property by Nazi Germany in view of a letter from the Acting Legal Adviser of the Department of State to the effect:

"The policy of the Executive, with respect to claims asserted in the United States for the restitution of identifiable property (or compensation in lieu thereof) lost through force, coercion, or duress as a result of Nazi persecution in Germany, is to relieve American courts from any restraint upon the exercise of their jurisdiction to pass upon the validity of the acts of Nazi officials.'" *Id.*, at 376.

The "*Bernstein*" exception has been successfully applied only once. As the Court of Appeals noted in this case, 442 F. 2d 530, 535 (1971):

"[T]he *Bernstein* exception has been an exceedingly narrow one. Prior to the present case, a 'Bernstein letter' has been issued only once—in the *Bernstein* case itself. Moreover, the case has never been followed successfully; it has been relied upon only twice, and in both of those instances, by lower courts whose decisions were subsequently reversed."

invocation of the rule will not promote domestic foreign policy interests, his opinion states the view, adopting the "Bernstein" exception, that the doctrine does not apply. This syllogism—from premise to conclusion—is, with all respect, mechanical and fallacious. Moreover, it would require us to abdicate our judicial responsibility to define the contours of the act of state doctrine so that the Judiciary does not become embroiled in the politics of international relations to the damage not only of the courts and the Executive but of the rule of law.

MR. JUSTICE REHNQUIST's opinion also finds support for its result in *National City Bank*, and MR. JUSTICE DOUGLAS remands on the authority of that case alone. In his view, "[f]air dealing" requires that a foreign sovereign suing in our courts be subject to setoffs, even though counterclaims are barred by the act of state doctrine for amounts exceeding the state's claim. I believe that *National City Bank* is not at all in point, and that my Brother DOUGLAS' view leads to the strange result that application of the act of state doctrine depends upon the dollar value of a litigant's counterclaim.

Finally, MR. JUSTICE POWELL acknowledges that *Sabbatino*, not *National City Bank*, controls this case, but, nonetheless, votes to remand on the ground that *Sabbatino* was wrongly decided. In my view, nothing has intervened in the eight years since that decision to put its authority into question.

## I

On September 16 and 17, 1960, the Government of Cuba nationalized the branch offices of petitioner in Cuba. Petitioner promptly responded by selling collateral that had previously been pledged in security for a loan it had made to a Cuban instrumentality. Respondent—alleged by petitioner to be an agent of the Cuban Gov-



ernment<sup>2</sup>—in turn, instituted this action to recover the excess of the proceeds of the sale over the accrued interest and principal of the loan.<sup>3</sup> Petitioner then counterclaimed for the value of its Cuban properties, alleging that they had been expropriated in violation of international law.<sup>4</sup> On cross motions for summary judgment,

<sup>2</sup> The District Court below on cross motions for summary judgment found respondent to be "one and the same" as the Government of Cuba. 270 F. Supp. 1004, 1006 (1967). Respondent argues that its relationship with Cuba was a disputed issue of fact that could not properly be resolved before trial. This issue, not decided by the Court of Appeals, see 431 F. 2d 394, 397 (1970), is necessarily open for consideration on remand.

<sup>3</sup> The complaint also pleaded a second cause of action that is not material to the issues before us.

<sup>4</sup> Petitioner actually asserts two counterclaims—first, that the Cuban expropriation was invalid, giving rise to damages, and, second, that Cuba became indebted to petitioner, regardless of the validity of the expropriation decree. Moreover, petitioner invokes Cuban and United States as well as international law in support of both claims. These refinements are of no avail to petitioner. If applicable, the act of state doctrine, of course, bars consideration of both international law claims; although the Court in *Sabbatino* stated its holding in terms that "the Judicial Branch will not examine the *validity* of a taking of property within its own territory by a foreign sovereign government . . .," 376 U. S., at 428 (emphasis added), the holding clearly embraced judicial review not only of the taking but of the obligation to make "prompt, adequate, and effective compensation." *Id.*, at 429. See also *id.*, at 433.

Similarly, petitioner's allegations do not state cognizable claims under Cuban law. *Sabbatino* affirmed that United States courts will not sit in judgment on the validity of a foreign act of state under foreign law, for such an inquiry "would not only be exceedingly difficult but, if wrongly made, would be likely to be highly offensive to the state in question." *Id.*, at 415 n. 17. The same rationale applies to petitioner's assertion that it is entitled to compensation under Cuban law. Although foreign causes of action may, of course, be entertained in appropriate circumstances in our courts, the claim in issue presents the same dangers as the claim of invalidity of the expropriation under Cuban law. In any

the District Court held that petitioner "is entitled to set-off as against [respondent's] claim for relief any amounts due and owing to it from the Cuban Government by reason of the confiscation of [its] Cuban properties." 270 F. Supp. 1004, 1011 (1967). The Court of Appeals for the Second Circuit reversed on the ground that the act of state doctrine, as applied in *Sabbatino*, forecloses judicial review of the nationalization of petitioner's branch offices. 431 F. 2d 394 (1970).<sup>5</sup>

While a petition to this Court was pending for a writ of certiorari, the Legal Adviser of the Department of State advised us that the act of state doctrine should not be applied to bar consideration of counterclaims in

event, as the Court indicated in *Sabbatino*, *ibid.*, if Cuban law governs, the test to be applied is the success petitioner's claims would receive in Cuba itself. It cannot seriously be contended that Cuban courts would hold the nationalization of petitioner's properties invalid or Cuba liable to petitioner for meaningful compensation. Indeed, although Art. 24 of the Fundamental Law of Cuba provides for compensation for certain public takings, Cuban Law No. 851, pursuant to which petitioner's properties were nationalized, itself declares in Art. 6 that "[t]he resolutions . . . in the forced expropriation proceedings instituted hereunder may not be appealed, as no remedial action shall be available there against." Moreover, the promise of compensation provided under Law No. 851 may, as the Court said in *Sabbatino*, *id.*, at 402, "well be deemed illusory."

Finally, United States law becomes relevant only if the public-policy-of-the-forum exception to the *lex loci* conflicts-of-law rule is recognized—that is, if the American forum is free, because of its public policy, to deny recognition to Cuban law otherwise applicable as the law of the situs of the property seized. But the very purpose of the act of state doctrine is to forbid application of that exception. See generally, *e. g.*, Henkin, Act of State Today: Recollections in Tranquillity, 6 Colum. J. of Transnat'l L. 175 (1967). See also *Sabbatino*, *supra*, at 438.

<sup>5</sup> In arriving at this conclusion, the court found inapplicable the Hickenlooper Amendment to the Foreign Assistance Act of 1964, 78 Stat. 1013, as amended, 22 U. S. C. § 2370 (e)(2). I agree with my colleagues in leaving that determination undisturbed.

the circumstances of this case. More particularly, the Legal Adviser stated:<sup>6</sup>

"Recent events, in our view, make appropriate a determination by the Department of State that the act of state doctrine need not be applied when it is raised to bar adjudication of a counterclaim or setoff when (a) the foreign state's claim arises from a relationship between the parties existing when the act of state occurred; (b) the amount of the relief to be granted is limited to the amount of the foreign state's claim; and (c) the foreign policy interests of the United States do not require application of the doctrine.

"In this case, the Cuban government's claim arose from a banking relationship with the defendant existing at the time the act of state—expropriation of defendant's Cuban property—occurred, and defendant's counterclaim is limited to the amount of the Cuban government's claim. We find, moreover, that the foreign policy interests of the United States do not require the application of the act of state doctrine to bar adjudication of the validity of a defendant's counterclaim or set-off against the Government of Cuba in these circumstances.

"The Department of State believes that the act of state doctrine should not be applied to bar consideration of a defendant's counterclaim or set-off against the Government of Cuba in this or like cases."

We granted certiorari, vacated the judgment of the Court of Appeals, and, without expressing any views on the

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<sup>6</sup> The text of the Legal Adviser's views appears in full in 442 F. 2d, at 536-538.

merits of the case, remanded for reconsideration in light of this statement of position by the Department of State. 400 U. S. 1019 (1971). On remand the Court of Appeals adhered to its original decision, 442 F. 2d 530 (1971), and we again granted certiorari, 404 U. S. 820 (1971).

## II

The opinion of MR. JUSTICE REHNQUIST, joined by THE CHIEF JUSTICE and MR. JUSTICE WHITE, states that "[t]he only reason for not deciding the case by use of otherwise applicable legal principles would be the fear that legal interpretation by the judiciary of the act of a foreign sovereign within its own territory might frustrate the conduct of this country's foreign relations." Even if this were a correct description of the rationale for the act of state doctrine, the conclusion that the reason for the rule ceases when the Executive, as here, requests that the doctrine not be applied plainly does not follow. In *Sabbatino* this Court reviewed at length the risks of judicial review of a foreign expropriation in terms of the possible prejudice to the conduct of our external affairs. The Court there explained, 376 U. S., at 432-433:

"If the Executive Branch has undertaken negotiations with an expropriating country, but has refrained from claims of violation of the law of nations, a determination to that effect by a court might be regarded as a serious insult, while a finding of compliance with international law would greatly strengthen the bargaining hand of the other state with consequent detriment to American interests.

"Even if the State Department has proclaimed the impropriety of the expropriation, the stamp of approval of its view by a judicial tribunal, however impartial, might increase any affront and the judicial decision might occur at a time, almost always well

after the taking, when such an impact would be contrary to our national interest. Considerably more serious and far-reaching consequences would flow from a judicial finding that international law standards had been met if that determination flew in the face of a State Department proclamation to the contrary. . . . In short, whatever way the matter is cut, the possibility of conflict between the Judicial and Executive Branches can hardly be avoided."

This reasoning may not apply where the Executive expressly stipulates that domestic foreign policy interests will not be impaired however the court decides the validity of the foreign expropriation. But by definition those cases can only arise where the political branch is indifferent to the result reached, and that surely is not the case before us. The United States has protested the nationalization by Cuba of property belonging to American citizens as a violation of international law. The United States has also severed diplomatic relations with that government. The very terms of the Legal Adviser's communication to this Court, moreover, anticipate a favorable ruling that the Cuban expropriation of petitioner's properties was invalid.<sup>7</sup>

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<sup>7</sup> The Legal Adviser states:

"Recent events, in our view, make appropriate a determination by the Department of State that the act of state doctrine need not be applied [in cases of this kind] . . . .

"The 1960's have seen a great increase in expropriations by foreign governments of property belonging to United States citizens. Many corporations whose properties are expropriated, financial institutions for example, are vulnerable to suits in our courts by foreign governments as plaintiff, for the purpose of recovering deposits or sums owed them in the United States without taking

*Sabbatino* itself explained why in these circumstances the representations of the Executive in favor of removing the act of state bar cannot be followed: "It is highly questionable whether the examination of validity by the judiciary should depend upon an educated guess by the Executive as to probable result and, at any rate, should a prediction be wrong, the Executive might be embarrassed in its dealings with other countries." *Id.*, at 436. Should the Court of Appeals on remand uphold the Cuban expropriation in this case, the Government would not only be embarrassed but find its extensive efforts to secure the property of United States citizens abroad seriously compromised.<sup>8</sup>

Nor can it be argued that this risk is insubstantial because the substantive law controlling petitioner's claims

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into account the institution's counterclaims for their assets expropriated in the foreign country."

The implication is clear that the Legal Adviser believes that such corporations are entitled to offsetting redress for the value of their nationalized property. Note, 12 Harv. Int'l L. J. 557, 576-577 (1971). It is also significant that the Government in the past has acknowledged "that a '*Bernstein* letter,' should one be issued in special circumstances where it might be appropriate, plainly does not seek to decide the case in question, but merely removes the act of state bar to judicial consideration of the foreign act." Brief for the United States as *Amicus Curiae*, in *Banco Nacional de Cuba v. Sabbatino*, No. 16, October Term 1963, at 38. The Government makes no such representation in this case. Note, *supra*, at 571 and n. 74. To the contrary, the Government now argues: "By disregarding [the] statement of Executive policy involving foreign investment by American firms, the court below has seriously restricted the capacity of the government to assist American investors in securing prompt, adequate and effective compensation for expropriation of American property abroad." Memorandum for the United States as *Amicus Curiae*, at 3.

<sup>8</sup> See *Sabbatino*, 376 U. S., at 432: "Relations with third countries which have engaged in similar expropriations would not be immune from effect."

is clear. The Court in *Sabbatino* observed that "[t]here are few if any issues in international law today on which opinion seems to be so divided as the limitations on a state's power to expropriate the property of aliens." *Id.*, at 428.<sup>9</sup> And this observation, if anything, has more force in this case than in *Sabbatino*, since respondent argues with some substance that the Cuban nationalization of petitioner's properties, unlike the expropriation at issue in *Sabbatino*, was not discriminatory against United States citizens.

Thus, the assumption that the Legal Adviser's letter removes the possibility of interference with the Executive in the conduct of foreign affairs is plainly mistaken.

### III

That, however, is not the crux of my disagreement with my colleagues who would uphold the "*Bernstein*" exception. My Brother REHNQUIST's opinion asserts that the act of state doctrine is designed primarily, and perhaps even entirely, to avoid embarrassment to the political branch. Even a cursory reading of *Sabbatino*, this Court's most recent and most exhaustive treatment of the act of state doctrine, belies this contention. Writing for a majority of eight in *Sabbatino*, Mr. Justice Harlan laid bare the foundations of the doctrine as follows, *id.*, at 427-428:

"If the act of state doctrine is a principle of decision binding on federal and state courts alike but compelled by neither international law nor the Constitution, its continuing vitality depends on its capacity to reflect the proper distribution of func-

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<sup>9</sup> It bears repeating here what the Court said in a footnote to this statement, *id.*, at 429 n. 26: "We do not, of course, mean to say that there is no international standard in this area; we conclude only that the matter is not meet for adjudication by domestic tribunals." See n. 14, *infra*.



tions between the judicial and political branches of the Government on matters bearing upon foreign affairs. It should be apparent that the greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it, since the courts can then focus on the application of an agreed principle to circumstances of fact rather than on the sensitive task of establishing a principle not inconsistent with the national interest or with international justice. It is also evident that some aspects of international law touch much more sharply on national nerves than do others; the less important the implications of an issue are for our foreign relations, the weaker the justification for exclusivity in the political branches. The balance of relevant considerations may also be shifted if the government which perpetrated the challenged act of state is no longer in existence, as in the *Bernstein* case [see n. 1, *supra*], for the political interest of this country may, as a result, be measurably altered."

Applying these principles to the expropriation before the Court, Mr. Justice Harlan noted the lack of consensus among the nations of the world on the power of a state to take alien property, and stated further that "[i]t is difficult to imagine the courts of this country embarking on adjudication in an area which touches more sensitively the practical and ideological goals of the various members of the community of nations." *Id.*, at 430. He reviewed as well the possible adverse effects from judicial review of foreign expropriations on the conduct of our external affairs, discussed above, and emphasized the powers of the Executive "to ensure fair treatment of United States nationals," *id.*, at 435, in

comparison to the "[p]iecemeal dispositions," *id.*, at 432, that courts could make:

"Following an expropriation of any significance, the Executive engages in diplomacy aimed to assure that United States citizens who are harmed are compensated fairly. Representing all claimants of this country, it will often be able, either by bilateral or multilateral talks, by submission to the United Nations, or by the employment of economic and political sanctions, to achieve some degree of general redress. Judicial determinations of invalidity of title can, on the other hand, have only an occasional impact, since they depend on the fortuitous circumstance of the property in question being brought into this country." *Id.*, at 431.

"When one considers the variety of means possessed by this country to make secure foreign investment, the persuasive or coercive effect of judicial invalidation of acts of expropriation dwindles in comparison." *Id.*, at 435.<sup>10</sup>

Only in view of all these considerations did he conclude, *id.*, at 428:

"[T]he Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign government, extant and recognized by this country at the time of suit, in the absence of a treaty or other unambiguous agreement regarding controlling legal principles, even if the com-

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<sup>10</sup> Mr. Justice Harlan also observed that "[a]nother serious consequence" of suspending the act of state bar "would be to render uncertain title in foreign commerce, with the possible consequence of altering the flow of international trade." 376 U. S., at 433. See also *id.*, at 437 (impact on flow of trade, though not security of title, even where sovereign is plaintiff). This consideration, of course, does not apply where, as here, the property seized is not an exportable commodity.

plaint alleges that the taking violates customary international law."

In short, *Sabbatino* held that the validity of a foreign act of state in certain circumstances is a "political question" not cognizable in our courts.<sup>11</sup> Only one—and not necessarily the most important—of those circumstances concerned the possible impairment of the Executive's conduct of foreign affairs. Even if this factor were absent in this case because of the Legal Adviser's statement of position, it would hardly follow that the act of state doctrine should not foreclose judicial review of the expropriation of petitioner's properties. To the contrary, the absence of consensus on the applicable international rules, the unavailability of standards from a treaty or other agreement, the existence and recognition of the Cuban Government, the sensitivity of the issues to national concerns, and the power of the Executive alone to effect a fair remedy for all United States citizens who have been harmed all point toward the existence of a "political question." The Legal Adviser's letter does not purport to affect these considerations at all. In any event, when coupled with the possible consequences to the conduct of our foreign relations explored above, these considerations compel application of the act of state doctrine, notwithstanding the Legal Adviser's suggestion to the contrary.<sup>12</sup> The

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<sup>11</sup> Cf. *Baker v. Carr*, 369 U. S. 186, 211-212 (1962):

"Our cases in this field [of political questions involving foreign relations] seem invariably to show a discriminating analysis of the particular question posed, in terms of the history of its management by the political branches, of its susceptibility to judicial handling in the light of its nature and posture in the specific case, and of the possible consequences of judicial action."

<sup>12</sup> A comparison of the facts in the *Bernstein* case, n. 1, *supra*, with the circumstances of this case reinforces this conclusion. As

Executive Branch, however extensive its powers in the area of foreign affairs, cannot by simple stipulation change a political question into a cognizable claim.<sup>13</sup>

the Government itself has acknowledged, Brief for the United States as *Amicus Curiae*, n. 7, *supra*, at 37-38:

"The circumstances leading to the State Department's letter in the *Bernstein* case were of course most unusual. The governmental acts there were part of a monstrous program of crimes against humanity; the acts had been condemned by an international tribunal after a cataclysmic world war which was caused, at least in part, by acts such as those involved in the litigation, and the German State no longer existed at the time of [the] State Department's letter. Moreover, the principle of payment of reparations by the successor German government had already been imposed, at the time of the '*Bernstein* letter,' upon the successor government, so that there was no chance that a suspension of the act of state doctrine would affect the negotiation of a reparations settlement."

On these facts the result, though not the rationale, in *Bernstein* may be defensible. See, e. g., R. Falk, *The Status of Law in International Society* 407 and n. 12 (1970).

<sup>13</sup> My Brother REHNQUIST's opinion attempts to bolster its result by drawing an analogy between the act of state doctrine and the rule of deference to the Executive in the areas of sovereign immunity and recognition of foreign powers. That rule has itself been the subject of much debate and criticism. See generally, e. g., R. Falk, *The Role of Domestic Courts in the International Legal Order* 139-169 (1964); Lillich, *The Proper Role of Domestic Courts in the International Legal Order*, 11 *Va. J. Int'l L.* 9, 9-27 (1970); Note, 53 *Minn. L. Rev.* 389 (1968). See also *Sabbatino*, 376 U. S., at 411 n. 12. The analogy, in any case, is not persuasive. When the Judicial Branch in the past has followed an Executive suggestion of immunity in behalf of a foreign government or accorded significant weight to the failure of the Executive to make such a suggestion, the result has been simply either to foreclose judicial consideration of the claim against that government or to allow the suit to proceed on the merits of the claim and any other defenses the government may have. See, e. g., *Mexico v. Hoffman*, 324 U. S. 30 (1945); *Ex parte Peru*, 318 U. S. 578 (1943). Similarly, when the Judicial Branch has abided by an Executive determination of foreign sovereignty, the consequence has been merely

*Sabbatino*, as my Brother REHNQUIST's opinion notes, formally left open the validity of the "*Bernstein*" exception to the act of state doctrine. But that was only because the issue was not presented there. As six members of this Court recognize today, the reasoning of that case is clear that the representations of the Department of State are entitled to weight for the light they shed on the permutation and combination of factors underlying the act of state doctrine. But they cannot be determinative.

#### IV

To find room for the "*Bernstein*" exception in *Sabbatino* does more than disservice to precedent. MR. JUSTICE REHNQUIST's opinion states: "Our holding is no sense an abdication of the judicial function to the Executive Branch." With all respect, it seems patent that the contrary is true. The task of defining the contours of a political question such as the act of state doctrine is exclusively the function of this Court. *Baker v. Carr*, 369 U. S. 186 (1962), and cases cited therein; see R. Falk, *The Status of Law in International Society* 413 (1970). The "*Bernstein*" exception relinquishes the function to the Executive by requiring blind adherence to its requests that foreign acts of state be reviewed. Conversely, it politicizes the Judiciary. For the Executive's

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to require or deny the application of various principles governing the attributes of sovereignty. See, e. g., *United States v. Belmont*, 301 U. S. 324 (1937); *Russian Republic v. Cibrario*, 235 N. Y. 255, 139 N. E. 259 (1923). In no event has the Judiciary necessarily been called upon to assess a claim under international law. The effect of following a "*Bernstein* letter," of course, is exactly the opposite—the Judicial Branch must reach a judgment despite the possible absence of consensus on the applicable rules, the risk of irritation to sensitive concerns of other countries, and the danger of impairment to the conduct of our foreign policy. E. g., Note, n. 7, *supra*, at 575–577. See also *Sabbatino*, *supra*, at 438.

invitation to lift the act of state bar can only be accepted at the expense of supplanting the political branch in its role as a constituent of the international law-making community. As *Sabbatino*, 376 U. S., at 432-433, indicated, it is the function of the Executive to act "not only as an interpreter of generally accepted and traditional rules, as [do] the courts, but also as an advocate of standards it believes desirable for the community of nations and protective of national concerns."<sup>14</sup> The

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<sup>14</sup> This consideration, it may be noted, resolves the paradox Mr. JUSTICE WHITE, dissenting in *Sabbatino*, saw between the Court's finding there of an absence of consensus on the international rules governing expropriations and the Court's purpose to avoid embarrassment to the Executive in the conduct of external affairs. "I fail to see," he stated, "how greater embarrassment flows from saying that the foreign act does not violate clear and widely accepted principles of international law than from saying, as the Court does, that nonexamination and validation are required because there are no widely accepted principles to which to subject the foreign act." 376 U. S., at 465. There is, however, no inconsistency:

"The explicit holding in [*Sabbatino*] makes reference to the capacity of domestic courts and not to the status of the customary norms. All that *Sabbatino* says is that a domestic court is not an appropriate forum wherein to apply a rule of customary international law unless that rule is supported by a consensus at least wide enough to embrace the parties to the dispute. Such judicial self-restraint may not be appropriate if the forum is an international tribunal entrusted with competence by both sides, but the situation is different for a domestic court. The appearance of impartiality is as important to the formulation of authoritative law as is the actuality of impartiality. The [consequence] is that a domestic court, however manfully it struggles to achieve impartiality, will not be able to render an authoritative judgment when the adjudication requires it to decide whether the forum state or the foreign state is correct about its contentions as to the content of customary international law. The act of state doctrine, in the absence of a firm agreement on the rules of decision, acknowledges this incapacity of domestic courts." R. Falk, n. 12, *supra*, at 415.



"Bernstein" exception, nevertheless, assigns the task of advocacy to the Judiciary by calling for a judgment where consensus on controlling legal principles is absent. Note, 40 Ford. L. Rev. 409, 417 (1971). Thus, it countenances an exchange of roles between the Judiciary and the Executive, contrary to the firm insistence in *Sabbatino* on the separation of powers.<sup>15</sup>

The consequence of adopting the "Bernstein" approach would only be to bring the rule of law both here at home and in the relations of nations into disrespect. Indeed, the fate of the individual claimant would be subject to the political considerations of the Executive Branch. Since those considerations change as surely as administrations change, similarly situated litigants would not be likely to obtain even-handed treatment. This is all too evident in the very case before us. The Legal Adviser's suggestion that the act of state doctrine not apply here is carefully couched in terms applicable only to set-offs "against the Government of Cuba in this or like cases," see p. 6, *supra*—that is, where the Executive finds in its discretion that invocation of the doctrine is not required in the interests of American foreign policy vis-a-vis Cuba. Note, 12 Harv. Int'l L. J. 557, 562, 572 (1971).<sup>16</sup> In *Zschernig v. Miller*, 389 U. S. 429 (1968), this Court struck down an Oregon escheat statute as an unconstitutional invasion of the National Government's power over external affairs, despite advice from the Executive that the law did not

<sup>15</sup> See *Sabbatino*, 376 U. S., at 423, 427-428: "The act of state doctrine does . . . have 'constitutional' underpinnings." And "its continuing vitality depends on its capacity to reflect the proper distribution of functions between the judicial and political branches of the Government on matters bearing upon foreign affairs."

<sup>16</sup> For an account of how political considerations may have affected a State Department determination in a specific case, see Note, 75 Harv. L. Rev. 1607, 1610-1611 (1962).



unduly interfere with the conduct of our foreign policy. Paraphrasing from what my Brother STEWART said there, *id.*, at 443 (concurring opinion), we must conclude here:

“Resolution of so fundamental [an] issue [as the basic division of functions between the Executive and the Judicial Branches] cannot vary from day to day with the shifting winds at the State Department. Today, we are told, [judicial review of a foreign act of state] does not conflict with the national interest. Tomorrow it may.” See also *id.*, at 434-435 (DOUGLAS, J.).

No less important than fair and equal treatment to individual litigants is the concern that decisions of our courts command respect as dispassionate opinions of principle. Nothing less will suffice for the rule of law. Yet the “*Bernstein*” approach is calculated only to undermine regard for international law. It is, after all, as *Sabbatino* said, 376 U. S., at 434-435, a “sanguine presupposition that the decisions of the courts of the world’s major capital exporting country and principal exponent of the free enterprise system would be accepted as disinterested expressions of sound legal principles by those adhering to widely different ideologies.” This is particularly so where, as under the “*Bernstein*” approach, the determination of international law is made to depend upon a prior political authorization. *E. g.*, R. Falk, *The Role of Domestic Courts in the International Legal Order* 93-94, 136-137 (1964).

## V

MR. JUSTICE REHNQUIST’s opinion finds support for the result it reaches in *National City Bank v. Republic of China*, 348 U. S. 356 (1955), and MR. JUSTICE DOUGLAS bases his decision on that case alone. *National City Bank* held that, by bringing suit in our courts, a foreign

sovereign waives immunity on offsetting counterclaims, whether or not related to the sovereign's cause of action. Nothing in that decision spoke to the applicability of the act of state doctrine. My Brother REHNQUIST's opinion, nevertheless, seizes on language there that a sovereign suing in our courts "wants our law" and so should be held bound by it as a matter of equity. In a similar vein, my Brother DOUGLAS states that "[i]t would . . . offend our sensibilities if Cuba could collect the amount owed on . . . [her claim] and not be required to account for any setoff." Yet, on the assumption that equitable principles are relevant to respondent's cause of action, see Note, 75 Harv. L. Rev. 1607, 1619 (1962), it is by no means clear that the balance of equity tips in petitioner's favor. It cannot be argued that by seeking relief in our courts on a claim that does not involve any act of state, respondent has waived the protection of the act of state doctrine in defense to petitioner's counterclaims. See *ibid.* Furthermore, as the Court of Appeals pointed out below, 442 F. 2d, at 535, petitioner "is seeking a windfall at the expense of other" claimants whose property Cuba has nationalized. Our Government has blocked Cuban assets in this country for possible use by the Foreign Claims Settlement Commission to compensate fairly all American nationals who have been harmed by Cuban expropriations. Although those assets are not now vested in the United States or authorized to be distributed to claimants, it is reasonable to assume that they will be if other efforts at settling claims with Cuba are unavailing. In that event, if petitioner prevails here, it will, in effect, have secured a preference over other claimants who were not so fortunate to have had Cuban assets within their reach and whose only relief is before the Claims Commission. Conversely, if respondent prevails, its recovery will become a vested asset for fair and

ratable distribution to all claimants, including petitioner. See 431 F. 2d, at 403-404.

More important, reliance on *National City Bank* overlooks the fact that "our law" that respondent "wants" includes the act of state doctrine, to which we have adhered for decades, as the precedents on which *Sabbatino* relied demonstrates. See n. 1, *supra*. As *Sabbatino* indicated, 376 U. S., at 438, the doctrine, "although it shares with the immunity doctrine a respect for sovereign states," serves important policies entirely independent of that rule. See n. 13, *supra*. And those policies, with one exception, see n. 10, *supra*, apply with full force in this case, as we have seen. Indeed, MR. JUSTICE DOUGLAS concedes as much by recognizing that the political question rationale of *Sabbatino* would preclude a judgment for petitioner in excess of Cuba's claim. Why petitioner's counterclaims are any the less premised on a political question when they are stated only as offsets is not, and cannot rationally, be explained.

In *Sabbatino* itself the Court considered "whether Cuba's status as a plaintiff [seeking to recover the proceeds of property she had expropriated] . . . dictates a result at variance with the conclusions reached [requiring application of the act of state doctrine]." 376 U. S., at 437. The Court held that it did not, noting that "[t]he sensitivity in regard to foreign relations and the possibility of embarrassment of the Executive are, of course, heightened by the presence of a sovereign plaintiff. The rebuke to a recognized power would be more pointed were it a suitor in our courts." *Ibid*. The Court observed, too, *id.*, at 438:

"Certainly the distinction proposed would sanction self-help remedies, something hardly conducive to a peaceful international order. Had [the defendant] not converted [the proceeds of the property Cuba had expropriated] . . . , Cuba could have

relied on the act of state doctrine in defense of a claim brought . . . for the proceeds. It would be anomalous to preclude reliance on the act of state doctrine because of [the defendant's] unilateral action, however justified such action may have been under the circumstances."

These considerations, equally applicable here, together with the general policies underlying the act of state doctrine caused the Court to conclude that Cuba's status as a plaintiff was immaterial. But the Court went on to determine whether there were any remaining litigable issues for determination on remand and held that "any counterclaim [against Cuba] based on asserted invalidity [of her expropriation] must fail." *Id.*, at 439. *Sabbatino* thus answered the very point on which some of my brethren now rely—and, furthermore, did so in the face of *National City Bank*, as the Court's discussion of that decision in *Sabbatino*, *id.*, at 438, shows.



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Supreme Court  
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MICHAEL RODAK,

# Supreme Court of the United States

No. 70-295

FIRST NATIONAL CITY BANK,

*Petitioner,*

*against*

BANCO NACIONAL DE CUBA,

*Respondent.*

## PETITION FOR REHEARING

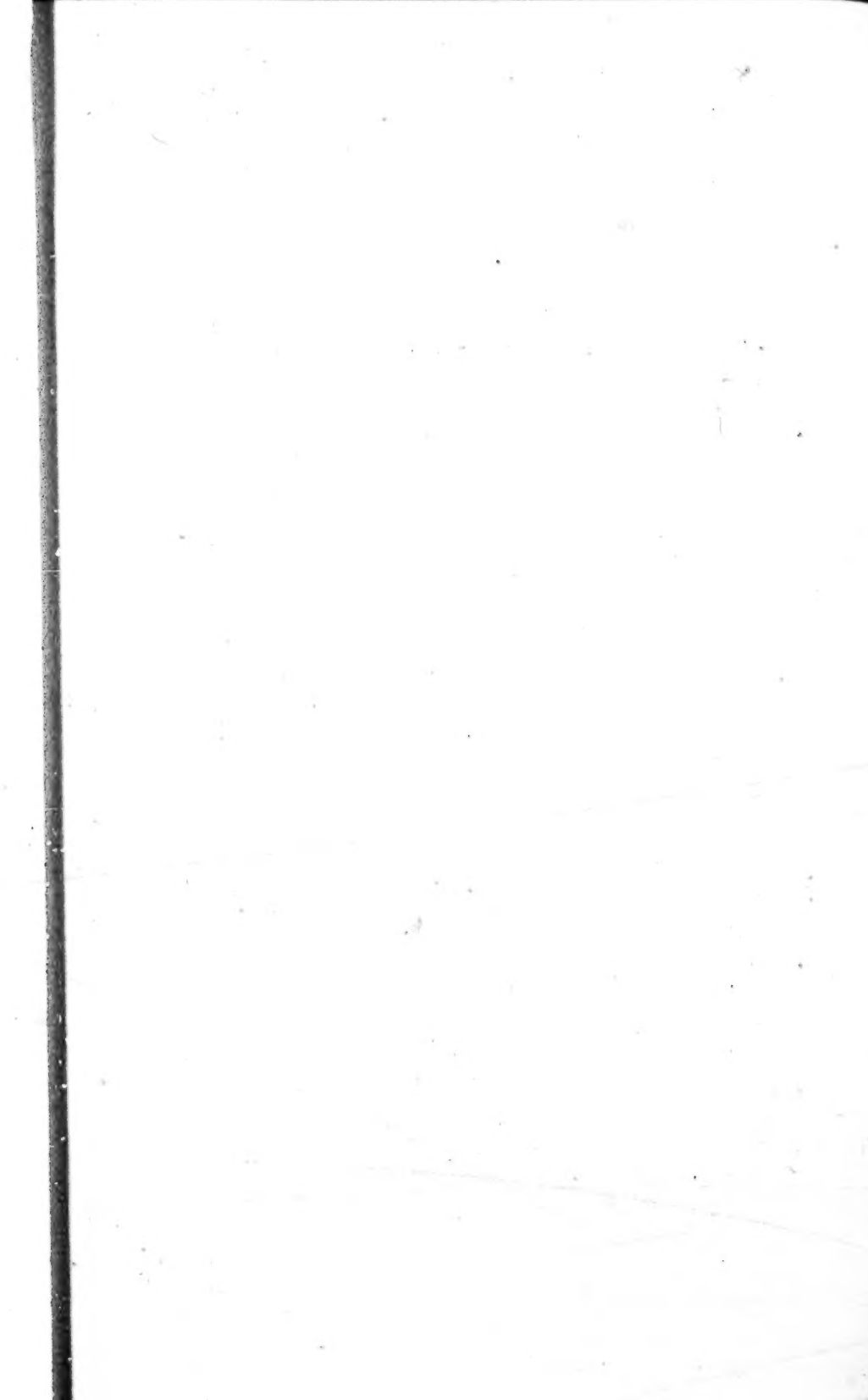
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June 29, 1972





## TABLE OF AUTHORITIES

	PAGE
 CASES:	
<i>American Banana Co. v. United Fruit Co.</i> , 213 U.S. 347 .....	7
<i>Banco Nacional de Cuba v. Sabbatino</i> , 376 U.S. 328 (1964) .....	2, 3, 4, 5, 7, 8, 10
<i>Bernstein v. N.V. Nederlandsche-Amerikaansche, etc.</i> , 210 F. 2d 375 (2nd Cir. 1954) .....	4
<i>Oetjen v. Central Leather Co.</i> , 246 U.S. 297 .....	7
<i>National City Bank v. Republic of China</i> , 348 U.S. 356 .....	4, 5, 8
<i>Ricaud v. American Metal Co.</i> , 246 U.S. 304 .....	7
<i>Sardino v. Federal Reserve Bank</i> , 361 F. 2d 106 (2nd Cir. 1966), <i>cert. den.</i> 385 U.S. 898 .....	9
<i>United States v. Belmont</i> , 301 U.S. 324 .....	8
<i>United States v. Pink</i> , 315 U.S. 203 .....	7
 STATUTES:	
31 C.F.R. Part 515.101 to 515.808 .....	9
 MISCELLANEOUS:	
<i>American Journal of International Law</i> , January, 1972 .....	3
43 Dept. of State Bulletin 171, 316 (1960) .....	6
Hearings before the House Committee on Foreign Affairs on H.R. 7750, 89th Cong., 1st Sess. (1965), pp. 1234 ff. ....	7
Hearings before the Senate Committee on Foreign Relations on the Foreign Assistance Program, 89th Cong., 1st Sess. (1965), pp. 728-29 .....	7
<i>The Nation</i> , June 19, 1972, at 777 .....	3

7

# Supreme Court of the United States

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No. 70-295

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FIRST NATIONAL CITY BANK,

*Petitioner,*

*against*

BANCO NACIONAL DE CUBA,

*Respondent.*

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## PETITION FOR REHEARING

Pursuant to Rule 58 of the Rules of this Court, respondent hereby petitions this Court for a rehearing of the decision herein dated June 7, 1972. Rehearing is sought on the following grounds:

### I

There were four issues passed upon by this Court in the several opinions written herein. Although a majority of the Court found in favor of respondent on every one of these issues, the conclusion reached by a majority of the Court was nevertheless to reverse and remand.<sup>1</sup>

The result is a decision which can but sow confusion and doubt in an area of law in which clarification and

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<sup>1</sup> The issues were:

1. The validity of the Bernstein exception (Brennan, Stewart, Marshall, Blackmun, Douglas and Powell, JJ. supported respondent's position);

certainty are sorely needed. The decision of the Court affords no guidance for the future. Another case coming before this Court presenting the same set of facts may well be decided differently if the then Legal Advisor to the State Department happens to be an ideological descendant of Abram Chayes,<sup>2</sup> rather than a follower of John Stevenson. Another case coming before this Court presenting the same difficult legal issues, the same problems of possible conflict between the Judicial and Executive Branches, the same effect on our foreign relations, may well be decided differently if the issues are posed by a direct suit rather than by a counterclaim.

In sum, this Court has decided nothing at all, save that in the circumstances of this case, the act of state doctrine does not apply. Why it does not apply remains in doubt, since there was no majority of the Court for any theory supporting its conclusion.

## II

This would be an unfortunate result even if the case were an insignificant one, affecting only the parties thereto or relating only to private interests. But the case is far from insignificant. There are other similar cases, even

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2. The applicability of the act of state doctrine to a counterclaim (Brennan, Stewart, Marshall, Blackmun and Powell, JJ. supported respondent's position);

3. The inapplicability of the Hickenlooper Amendment, the sole ground of the decision in the District Court. (The entire Court, *sub silentio*, supported the respondent's position);

4. The continued vitality of the *Sabbatino* doctrine. (At least Brennan, Stewart, Marshall, Blackmun and Douglas, JJ. supported the respondent's position.)

This is not the only anomaly in this case. Four justices voted to affirm; four voted to remand to the Court of Appeals, and one voted to remand to the District Court.

<sup>2</sup> The Legal Advisor to the State Department at the time of the *Sabbatino* case.

now pending in the District Courts and, if we read the future accurately, there are many more such cases in the wings awaiting their turn.<sup>3</sup>

All of these cases involve, directly or indirectly, the governments of other nations. They all raise the kind of questions discussed in *Sabbatino* at pp. 428-434; they all involve delicate and difficult questions of law and they all involve substantial sums of money. Most important of all, they all involve the nationalization of private property by underdeveloped nations seeking to recover their natural resources. Such issues are not merely of private concern, they are issues of great public concern affecting not only our nation but others as well.

The influence of this Court on litigation which may develop anywhere in the world will be great, and it is important that its decisions be treated with respect. Such respect will not be forthcoming if the impression is created

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<sup>3</sup> There are no issues in the field of international law which are attracting more attention at the present time than those issues which arise from the nationalization of American-owned property in other countries. Almost every meeting of international lawyers in the last two years has devoted much attention to this subject. The journals devoted to the subject of international law have likewise given the subject a great deal of attention. See, for example, the January, 1972 issue of the *American Journal of International Law* which has two articles on this very case.

There is good reason for this. It has been estimated that United States properties expropriated since the beginning of 1961 are valued at approximately 2.5 billion dollars. *The Nation*, June 19, 1972, p. 777. This has included, in a short period of two and a half years, property in Peru, Bolivia and Chile. There is no reason to believe that the wave of expropriations has stopped—the contrary is true. Since this Court's opinion was written, Iraq has nationalized its oil installations and present signs point to the likelihood of extensive litigation arising therefrom somewhere in the world. For a more complete discussion of foreign expropriations of property see the appendix in the respondent's last brief to this Court in this case at pp. 47-57.

that any theory at all will do, so long as a result is reached. It may be that this Court cannot decide these issues by unanimous vote but it should at least strive to do so by majority vote. We urge that a rehearing may help the Court to accomplish such a result.

### III

We most respectfully suggest that the opinion of Mr. Justice Douglas, in particular, is based on a fundamental misconception of the meaning of the act of state doctrine and a misunderstanding of the consequences of the action of the Court. While accepting the *Sabbatino* doctrine as good law and rejecting the *Bernstein* exception thereto, that opinion relies exclusively on the fact that, in this case, the act of state doctrine is relied on as a defense to a counterclaim, and concludes that the central issue is governed by the *Republic of China* case, 348 U.S. 356, rather than by *Sabbatino*. We urge that the opinion is in error in several respects:

1. The opinion seems to consider that this is a case in which liability is conceded and the only issue is damages.<sup>4</sup> But this is error; the converse is true. Damages are conceded<sup>5</sup> and, if the act of state doctrine is not applicable, the issue to be litigated is liability. On this record, this Court cannot "allow the setoff" when its validity has not

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<sup>4</sup> So the opinion would remand "for trial on the amount of the setoff and . . . would *allow the setoff* up to the amount of the respondent's claim." (Douglas opinion, page 1, emphasis supplied).

<sup>5</sup> The error is easily understood since the Appendix prepared for this Court is incomplete. The principal opinion of the District Court was dated July 30, 1965 and is reported at 243 F. Supp. 957. That opinion does in fact direct a trial of the amount of the setoff. Subsequently, however, the parties stipulated that, for purposes of this litigation, "if the defendant [petitioner] is lawfully entitled to the offset claimed by it, the amount thereof is such that plaintiff [re-

been litigated in this Court or in the Court of Appeals.<sup>6</sup> On the other hand the *amount* of the setoff has been stipulated so that there is nothing to try on that issue.

2. We suggest, again with respect, that the application of the *Republic of China* case to this action has, at most, only surface plausibility which will not withstand analysis. Mr. Justice Powell is quite correct when he notes (p. 1) that the *Republic of China* case dealt with jurisdiction and the *Sabbatino* case with justiciability. And Mr. Justice Brennan is also correct when he notes (p. 3) that the Douglas view means that the act of state doctrine depends on the dollar value of the counterclaim. But there are still other reasons why *Sabbatino* applies and *Republic of China* does not.

One of respondent's "alternative bases of attack on the judgment of the District Court" to be considered by the Court of Appeals under the opinion of Mr. Justice Rehnquist (p. 11) is that nationalization of petitioner's property in Cuba did not violate international law. This is the very issue which this Court did not reach in *Sabbatino*. It is therefore the issue which this Court will have to decide unless the Court's decision is changed on rehearing.

We need not conjure up hypothetical situations to illustrate the serious problems which will result, for they are

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spondent] will take nothing in this action." Accordingly, on April 25, 1968 a final order was entered dismissing the action on the merits. That stipulation and order were not printed in the Appendix prepared for this Court although they do appear at pp. 131a and 132a of the Joint Appendix printed for the Court of Appeals. The actual state of the record is accurately described at page 3 of the petitioner's brief in this Court, at pages 4-5 of the respondent's brief and at p. 2 of Mr. Justice Rehnquist's opinion.

<sup>6</sup> Nor, for that matter, even in the District Court, which found for the petitioner but only because the court relied on the Hickenlooper Amendment, now evidently abandoned.



hard upon us. On a remand to the Court of Appeals, respondent will argue, as it has argued from the beginning, that the Cuban nationalizations were not a violation of international law. We believe this view of matters to be legally sound and we believe that any court will agree—once it is freed from the pressures which are implicit in this entire situation. See Point VII of respondent's last brief in this Court, pp. 38-46.

However, the pressures upon any court will be overwhelming and may well be irresistible—and we mean no disrespect to the courage and integrity of the judiciary. For the State Department has consistently taken the position, for reasons of its own foreign policy, that the Cuban nationalizations were a violation of international law. 43 Department of State Bulletin 171, 316 (1960). It has built its whole policy with respect to relations with Cuba and the rest of Latin America on that fundamental premise.<sup>7</sup> If the Court of Appeals on remand should be convinced, as we think it will be, that respondent is right on the law, it will be faced with the dilemma of having to repudiate the Executive Branch in an important matter relating to a foreign policy which has governed our relations with Latin America for twelve years, or having to decide the case opportunistically, contrary to the law. The State Department may view this prospect with equanimity but the Court should not.

We do not believe that such a situation should be permitted to occur, and yet it is implicit in this case. A decision by the Court of Appeals in support of petitioner will, in this setting, always be suspect in the eyes of the world. Such a result is intolerable in any case and particularly so in a matter of great moment.

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<sup>7</sup> This policy has included a breach of diplomatic relations with Cuba, a boycott of Cuban goods, a freezing of Cuban funds, the expulsion of Cuba from the Organization of American States, and an effort to induce the rest of Latin America to join in such a boycott—to say nothing of our support of the Bay of Pigs fiasco.

The act of state doctrine is intended primarily to protect this Court and, willy nilly, the Executive Branch of the government even when it is too shortsighted to understand the desirability of that protection.<sup>8</sup> The doctrine only secondarily protects the persons who happen to be litigating. The reasons for the act of state doctrine discussed by this Court in *Sabbatino* all point in that direction. None of them relate primarily to the interests of the parties; all of them are intended to prevent the embarrassment to the Court and to the Executive Branch which would result if these two Branches of our Government were forced into a conflict in the area of foreign relations where such a conflict would be harmful to the best interests of the United States. It is pointless to set forth in this petition any extensive excerpt from the *Sabbatino* decision, but we urge the careful re-reading of that opinion and particularly pages 427-437 thereof.

It may happen—in fact it happens more often than not—that the government whose act of state is at issue is not a party to the litigation at all and is not even represented, as it happens to be in this case, by one of its instrumentalities. *Oetjen v. Central Leather Co.*, 246 U.S. 297; *Ricaud v. American Metal Co.*, 246 U.S. 304; *American Banana Co. v. United Fruit Co.*, 213 U.S. 347; *United States v. Pink*, 315

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<sup>8</sup> In other administrations, the Executive Branch of the government has been much more cautious. It vigorously supported the act of state doctrine for all of the reasons set forth above in an amicus brief submitted in the *Sabbatino* case; subsequently, when the Hickenlooper amendment was pending before the Congress, administration representatives appeared and testified at length against it on the ground that it would result in a dilution of the act of state doctrine which was seen as a necessary protection for both the Judiciary and the Executive. Hearings before the House Committee on Foreign Affairs on H.R. 7750, 89th Cong., 1st Sess. [1965], p. 1234ff; Hearings before the Senate Committee on Foreign Relations on the Foreign Assistance Program, 89th Cong., 1st Sess. [1965], pp. 728-29.

U.S. 203; *United States v. Belmont*, 301 U.S. 324. Still, the Court has applied the act of state doctrine without consideration of what was "fair" to the litigants, because to do otherwise would be to present this Court with the alternatives of being an apologist for the State Department or deciding the case in a manner which would embarrass the Executive Branch.

None of the foregoing considerations are relevant to a sovereign immunity case such as *Republic of China*. There is no suggestion in the *Republic of China* case that any act of state by China was an issue in that litigation. It does not appear from the record that there was any possibility at all of embarrassment to either the Judicial or Executive Branches of the government or any possibility of conflict between them. The only interests sought to be protected by the *Republic of China* doctrine were the interests of the parties to that litigation. Nor is there any suggestion that a question of international law was raised. In short, not a single one of the considerations which moved the Court in *Sabbatino* were applicable to the *Republic of China* case and not a single one of the considerations which moved the Court in the *Republic of China* case are properly applicable to this case.

This was apparently recognized by the parties to the litigation in the *Republic of China* case. The Republic of China did not at any time plead an act of state as a defense to the claim; none of the parties even mentioned act of state in the briefs submitted to this or any lower federal court; none of the act of state cases cited by any of the parties to the litigation and, of course, none of the courts which considered the matter saw any relation at all between the issues in that case and the act of state doctrine.

3. One final point should be added in reference to the view of Mr. Justice Douglas that "fairness" requires the result he reaches.

In the first place, we remind the Court, once again, that the issue here is not whether petitioner or respondent gets the money for which petitioner sues in its counterclaim. Under 31 C.F.R. Part 515.101 to 515.808, any recovery here will be held in a frozen account for ultimate disposition. As the Court of Appeals pointed out, 431 F. 2d 394, at 404, and as Mr. Justice Brennan points out again at page 19 of his opinion, this will result in a preference for the petitioner over other claimants, and there is nothing fair about such a result.

In the second place, considerations of "fairness" are dangerous ones in this field. The present government of Cuba has a long list of grievances against the United States, and particularly against the large banks in the United States, including petitioner, which, in its opinion, exploited the people of Cuba for decades prior to 1969. Obviously, we are not going to argue that point in this memorandum, but in an historical sense there is much to be said in support of this view. If so, no recovery of funds could ever redress the balance. To say that, in these circumstances, it is "unfair" to apply the act of state doctrine as a defense to a counterclaim is to draw the boundaries of the Court's concern with "fairness" at an arbitrary point.

And, finally, the issues of national policy with which we are here concerned are of such a nature that "fairness" ought not to be a consideration in any event. This Court evidently was not concerned with fairness when it denied certiorari in *Sardino v. Federal Reserve Bank*, 361 F. 2d 106 (2nd Cir. 1966), *cert. den.* 385 U.S. 898, although the effect of that decision was to deprive an elderly impoverished Cuban longshoreman of the proceeds of a life insurance policy of which he was the beneficiary. The justification for that denial was that the best interests of the United States required freezing of Cuban funds. We suggest that the best interests of the United States here also require the application of the act of state doctrine.

## IV

The opinion of Mr. Justice Powell, we suggest, fails to give sufficient weight to the problems above discussed. We disagree with the view expressed in that opinion, suggesting that the *Sabbatino* holding was too broad, but even on a very narrow application of the act of state doctrine based on "a careful examination of the facts in [this] case and of the position, if any, taken by the political branches of the government" (Powell opinion, p. 2), the act of state doctrine should be applied here. We will not repeat the considerations which are discussed fully above at pp. 5-8. Even if "the judiciary [is not compelled] to eschew acting in all cases in which the underlying issue is the validity of expropriation under customary international law", it is compelled to eschew acting in this case.

We do not assume that there is no such thing as international law that can be resolved only by the exercise of power. The field of international law is a very broad one, and includes a wide variety of subjects. The only aspect of international law covered by the *Sabbatino* case was that set forth in footnote 1 of Justice Powell's opinion and certainly that does not exhaust the field of international law.

Even on the narrowest possible interpretation of the act of state doctrine, we suggest that it is applicable here.

## CONCLUSION

The respondent respectfully petitions this Court for a rehearing and upon such rehearing for an order affirming the decision of the Court of Appeals.

Respectfully submitted,

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June 29, 1972

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## CERTIFICATE

I hereby certify that the within petition for rehearing is presented in good faith and not for delay. The petition is restricted to the grounds above stated.

VICTOR RABINOWITZ